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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST FIDELITY BANCORPORATION AND
FIRST FIDELITY BANK, NATIONAL ASSOCIATION,
SOUTH JERSEY,

Petitioners,

v.

MARY LITTLE PARELL, Commissioner of Banking
of the State of New Jersey, *et. al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Third Circuit err in holding that a state court action to enjoin the merger of two national banks may be pursued in contravention of an approval of that merger by the federal banking authorities and the U.S. Department of Justice as mandated by The Bank Merger Act of 1966, 12 U.S.C. § 1828(c)?

2. Did the Court of Appeals for the Third Circuit err in holding that only the state courts may review a complaint which purports to charge a state cause of action where the facts stated clearly would support a federal complaint and are facially deficient under state law? Stated differently, may a complainant force parties to litigate purely federal questions in a state forum until he has run through the state appellate structure, rendering this Court the first federal forum wherein the true federal nature of the complaint may be tested?

LIST OF PARTIES AND RULE 28.1 STATEMENT

The parties to the proceedings below were the petitioners herein First Fidelity Bancorporation and First Fidelity Bank, National Association, South Jersey, and also the defendant-appellees Community Bancshares Corporation and National Bank and Trust Company of Gloucester County, which are no longer in existence. Also parties to the proceedings below are respondents United Jersey Banks, United Jersey Bank/Southwest, Constellation Bancorporation, The National State Bank, Horizon Bancorp., Princeton Bank, New Jersey National Bank, United Counties Bancorporation, United Counties Trust Company, and Mary Little Parell, in her capacity as Commissioner of Banking of the State of New Jersey.

Petitioners First Fidelity Bancorporation and First Fidelity Bank, National Association, South Jersey, have no parent companies, non-wholly owned subsidiaries or affiliates to list pursuant to Rule 28.1, except for The Treasurer, Inc., a non-wholly owned subsidiary of First Fidelity Bank, National Association, New Jersey, which is wholly-owned by First Fidelity Bancorporation, and the following affiliates (with respect to First Fidelity Bank, National Association, South Jersey):

Broad & Lombardy Associates, Inc.

Edison Place Holding Company

Fidco, Inc.

First Fidelity Bank, National Association, County

First Fidelity Bank, National Association, New Jersey

First Fidelity Bank, National Association, North Jersey

First Fidelity Bank, National Association, West Jersey

First Fidelity Brokers, Inc.

First Fidelity Capital Corporation

First Fidelity Community Development Corporation

First Fidelity Financial Corporation

First Fidelity Leasing Corporation

First Fidelity Service Corporation

First Fidelity Tradexport Corporation

First Fidelity Trust, National Association, Florida

F.N.S.B. I

Rohill Realty Corporation

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NO.

FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,
Petitioners,

v.

MARY LITTLE PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners First Fidelity Bancorporation and First Fidelity Bank, National Association, South Jersey, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 14, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 783 F.2d 360 (1986) and is reprinted in the appendix hereto at page 1a, *infra*.

The decision of the United States District Court for the District of New Jersey (Trenton) (Barry, J.) has not been reported. It is reprinted in the appendix hereto at page 23a, *infra*.

JURISDICTION

The opinion of the Court of Appeals was filed on February 14, 1986. The order denying rehearing and rehearing *in banc* was entered on March 11, 1986. This Court has jurisdiction to review the judgment of the Third Circuit pursuant to Section 1254(1) of Title 28 of the United States Code. The action of a circuit court of appeals directing a remand to a state court is reviewable in this court. *Aetna Casualty & Sur. Co. v. Flowers*, 330 U.S. 464 (1947).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art III, §2, cl 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *

28 U.S.C. §1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1441(a):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The National Bank Act, 12 U.S.C. §§ 214c and 215a(a):

§ *214c*: No conversion of a national banking association into a State bank or its merger or consolidation with a State bank * * * shall take place under said sections unless under the law of the State in which such national banking association is located State banks may without approval by any State authority convert into and merge or consolidate with national banking associations under limitations no more restrictive than those * * * with respect to the conversion of a national bank into, or merger or consolidation of a national bank with, a State bank under State charter.

§ *215a(a)*: One or more national banking associations or one or more State banks, with the approval of the Comptroller, * * * may merge into a national banking association located within the same State, under the charter of the receiving association. * * *

The Bank Merger Act of 1966, 12 U.S.C. §1828(c):

* * *

(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank; * * *

* * *

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General

and the other two banking agencies referred to in this subsection. * * *

(5) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

* * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination

of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, * * *

* * *

(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia.

* * *

N.J. Stat. Ann. §17:9A-148 (West 1984):

A. As used in subsection B of this section, "applicable Federal law" means the laws of the United States, as presently enacted and as hereafter from time to time supplemented or amended, governing the merger or consolidation of a bank organized under State laws into a national banking association, under the charter of such association; * * *

B. One or more banks may, without the approval of the commissioner or any other officer, department, board or agency of this State, merge into or consolidate with a national banking association under the charter of such association, with the approval of the holders of at least 2/3 of the capital stock of each such bank entitled to vote. * * * [A] merger or consolidation authorized by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger or consolidation shall be subject to sections 132 through 147 or to any other law of this State; * * *

STATEMENT OF THE CASE

On January 8, 1985, the National Bank and Trust Company of Gloucester County ("NB & T"), a national bank, entered into an agreement to merge into First Fidelity Bank, National Association, South Jersey ("First Fidelity"), also a national bank, under the Federal charter of the latter. Under the terms of the merger the shareholders of NB & T would receive stock in First Fidelity's parent, First Fidelity Bancorporation ("Bancorporation"), and NB & T's shares would be canceled by operation of law pursuant to the statutory merger provisions of 12 U.S.C. §215a. On April 3, 1985 these banks filed an application for approval of the merger with the United States Comptroller of the Currency ("the Comptroller"), a division of the United States Department of the Treasury, as required by the Bank Merger Act of 1966 ("the Bank Merger Act"), 12 U.S.C. §1828(c). The Comptroller accepted the filing on April 15, 1985, established a public file for the proposed merger, and, as required by the Bank Merger Act, requested reports on the competitive factors involved from the Department of Justice and the other federal banking agencies. On May 3, 1985 the Justice Department responded with respect to the merger, stating in relevant part:

> We have reviewed this proposed transaction and conclude that it would not have a significantly adverse effect on competition.

The Federal Reserve Bank in Philadelphia, on behalf of the Board of Governors, concluded:

> This merger will have no adverse effect on existing competition in the Philadelphia PMSA, the market where both banks currently operate. The market is unconcentrated and will remain so after the proposed merger. Potential competition will

> not be adversely affected because none of the relevant markets meets all of the criteria for intensive scrutiny. In conclusion, this merger will have no significant effects on competition.

On May 14, 1985 five large New Jersey banking organizations—three of whom had theretofore "filed formal protests against the merger" with the Comptroller, 783 F.2d at 362, wherein they alleged that the merger would violate the Bank Merger Act—filed an action in the Superior Court of the State of New Jersey, Chancery Division (Burlington County), seeking "an injunction against the consummation of the merger," 783 F.2d at 364, and a declaration that New Jersey antitrust and banking laws "applied to the merger and that the merger would violate these laws" (*Id.*)[1] Conceding that the merger was subject to the exclusive jurisdiction of the Comptroller, the complaint contended that the state was not thereby wholly ousted from jurisdiction because of some asserted bank holding company involvement.[2] Because of the holding

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[1] While the complaint expressly alleged that the Comptroller of the Currency would subject the proposed merger to review "to determine its effects on . . . established geographical regions" under the federal antitrust laws, the plaintiffs also sought review of the merger under the New Jersey Antitrust Act, N.J. Stat. Ann. § 56:9-4 (although the activities of banks were exempted therefrom under § 56:9-5), with respect to different geographical areas: "the State of New Jersey or its specific communities," (Complaint, Second Count, ¶5), and under different structural standards, such as the arbitrary statewide cap on deposits (N.J. Stat. Ann. § 17:9A-345).

[2] The "involvement" of the holding company apparently arises out of the use of Bancorporation stock as consideration to the shareholders of NB & T. Community Bancshares Corporation went out of existence before the merger took place. Indeed, the Federal Reserve Board, the primary regulator of holding company acquisitions, failed to discern any regulatory role for the Bank Holding Company Act of 1956 in this merger, despite having only months earlier asserted its appropriate role in the proposed acquisition of Heritage Bancorporation by Mellon Bank Corporation, where the parties had tried to oust the Board from ju-

company "involvement," the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.*, was asserted to apply. And since the Bank Holding Company Act expressly preserved such state law as the states might already have had with respect to bank holding companies and their subsidiary banks, the complaint concluded that antitrust authority enacted by New Jersey *subsequent* to the 1966 enactment of the Bank Merger Act and the amendment to the Bank Holding Company Act gave the states authority to apply their own different competitive standards to bank acquisitions "involving" holding companies, rather than those mandated for the bank regulatory agencies, the Department of Justice and the courts for all acquisitions of insured banks under the identical standards in the Bank Merger Act and the 1966 amendment to the Bank Holding Company Act. The complaint therefore sought to "enjoin" the Commissioner of Banking of the State of New Jersey from approving "the acquisition of" NB & T by First Fidelity (Prayer, ¶E).[3]

The defendant banks and their corporate parents, also named as defendants, removed the action to federal court on June 3, 1985 and simultaneously moved to dismiss for failure to state a cause of action. The Commissioner, also named as a defendant, did not join in the removal, although she agreed that the complaint failed to state a

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risdiction by reason of the form of the affiliation. *See Girard Bank v. Board of Governors*, 748 F.2d 838 (3rd Cir. 1984).

[3] On May 7, 1985, plaintiffs filed a separate Petition before Commissioner Parell, the Commissioner of Banking of the State of New Jersey, asserting that "the proposed merger will not be in the public interest as it will result in an undue concentration in the Gloucester county banking market" and suggesting that the Commissioner had "jurisdiction" over the merger. Petition at 5. Plaintiffs sought "an order convening a plenary hearing on the proposed acquisition" of NB & T. Petition, at 6-7. When Commissioner Parell denied the petition on July 1, 1985, asserting a lack of jurisdiction under New Jersey law, plaintiffs appealed to the Superior Court of New Jersey, Appellate Division, where it is currently pending.

cause of action under New Jersey law. (Letter from Attorney General Kimmelman to Judge Barry, July 25, 1985, at 5.) Respondents cross-moved for remand. On July 31, 1985, the District Court, per Judge Maryanne Trump Barry, denied respondents' motion to remand and granted the petitioners' motion to dismiss. In its Opinion the District Court, *inter alia*, made the following determinations:

1. "Under the Federal Bank Merger Act, 12 U.S.C. Section 1828 *et seq.*, neither state law nor state agencies have any authority to regulate or review either the competitive aspects, 'the public interest' or 'the convenience and needs of the community to be served' with respect to mergers resulting in national banks." [Opinion, at 31a;]

2. "These standards [12 U.S.C. Section 1828(c)(5), 1828(c)(7)(B) and 1828(c)(8)] displace any other standards or laws, including state laws and thus, the standard embodied in any other laws, if to the contrary, must yield to the standards in the Bank Merger Act." [Opinion, at 31a;]

3. "[T]here are no applicable standards to the contrary here . . . as explicated by the New Jersey State Legislature in N.J.S.A. 17:9A-148, that mergers into national banks under national bank charters are beyond the power of the state to regulate." [Opinion, at 31a-32a;]

4. "[T]his is a situation in which the Plaintiffs' claim is 'exclusively governed by Federal law, so that the [Plaintiffs] necessarily [are] stating a Federal cause of action,' although they have couched it in terms of State law asserted against the merger of national banks." [Opinion, at 33a; bracketed words are the Court's;]

5. "Despite Plaintiffs' references to state law, it is the merger of two national banking associations that

Plaintiffs seek to block, and seek it on the face of their complaint." [Opinion, at 33a-34a;] and

6. "As Commissioner Parell made clear, she lacks jurisdiction to act in this matter, which is purely one of Federal concern." [Opinion, at 35a.]

On August 1, 1985, Bank respondents noticed their appeal of the part of the District Court's order granting the motion to dismiss and denying the motion for remand. While the appeal was pending before the Third Circuit, the Comptroller issued his approval of the merger, concluding:

> We have reviewed this proposal pursuant to the Bank Merger Act [12 U.S.C. 1828(c)] and find that it does not significantly lessen competition in the relevant market. [Letter of Steven J. Weiss, Deputy Comptroller for Branch Organization and Structure, August 29, 1985.]

On September 28, 1985, following the passage of the 30-day waiting period prescribed by the Bank Merger Act, Section 1828(c)(6), the merger of NB & T into First Fidelity was consummated. As a result, NB & T ceased to exist. Its assets are now owned by First Fidelity.

Counsel for petitioners thereafter in October, 1985 advised the Third Circuit of the consummation of the merger and of the provision of the Bank Merger Act that provides that if, as here, no suit is brought under the Bank Merger Act within the 30-day waiting period, "the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than Section 2 of Title 15. . ." 12 U.S.C. §1828(c)(7)(C).

The case was argued on November 18, 1985. On February 14, 1986, the Court of Appeals reversed the decision of the District Court and expressly declined to consider whether Section 1828(c)(7)(C) of the Bank Merger Act man-

dated a dismissal of the action as barred by the 30-day statute of limitations. 783 F.2d at 370 n. 12. It concluded that an action brought in state court to enjoin on state antitrust law grounds the merger of two national banks that concededly was within the jurisdiction of the Comptroller of Currency was not within the original jurisdiction of the federal district court and therefore not removable to federal court under 28 U.S.C. §1441.

The Court of Appeals held that the case had been improperly removed to the District Court because respondents "deliberately chose not to challenge the merger under the federal law." 783 F.2d at 363.[4] It held that, with respect to plaintiffs' antitrust challenge, "Congress has allowed the states to retain extensive authority to legislate in the antitrust field." 783 F.2d at 369. The Court of Appeals chose to view the Congressionally mandated uniform federal antitrust standard mandated for all insured bank mergers as provided in Section 1828(c)(7)(B) of the Bank Merger Act as not controlling parallel actions in state courts. Nowhere did it refer to this uniform federal antitrust standard, to the legislative history of the Bank Merger Act, or to the opinions of three other Circuits that have held the uniform federal antitrust standard to be the exclusive antitrust standard governing bank mergers and acquisitions.[5]

Moreover, although the Court of Appeals saw the Bank respondents' conduct as "yet another tactic," 783 F.2d at

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[4] In this respect the Court of Appeals apparently did not deem the formal protests filed by three of the respondents with the Comptroller, which expressly argued for the invalidity of the merger under the *Bank Merger Act*, as constituting a "challenge [to] the merger under the federal law."

[5] *County National Bank v. Board of Governors*, 654 F.2d 1253 (8th Cir. 1981); *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981); *Washington Mutual Savings Bank v. F.D.I.C.*, 482 F.2d 459 (9th Cir. 1973).

363, and as "attempting to use state law to prevent a merger between two nationally chartered banks," 783 F.2d at 362, it declined to find a case of "artful pleading" proscribed under this Court's ruling in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). Finally, the Court of Appeals assumed that the complaint had been "well-pleaded" under State law and apparently rejected any duty to determine the applicability of state law as it would affect national banks as a matter of federal law. But is not the *first* duty of the federal court to determine its own jurisdiction and not to abandon that question to a state court where the complaint—plainly raising a federal question (under the facts stated)—is deliberately silent on the federal issues?

REASONS FOR GRANTING THE WRIT[6]

I. The Decision Of The Court Of Appeals Conflicts With The Decisions Of Three Other Circuits And The Express Language Of Section 1828(c)(7)(B) Of The Bank Merger Act Of 1966.

The Court of Appeals apparently saw no incongruity in a *mandated* formal review of *every* bank acquisition by regulators, the Department of Justice and the courts under a given set of standards, only to be followed, in the right case, by another review at a state level under a different set of standards should a particular state care to try its hand at the same matter and (to be meaningful) arrive at a different result.

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[6] On February 24, 1986 this Court granted petitions for certiorari in *Metropolitan Life Ins. Co. v. Taylor*, No 85-686, and *General Motors Corp. v. Taylor*, No. 85-688, apparently to decide if the Sixth Circuit erred in holding that a state court claim under an employee benefit plan covered by federal law, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, does not "arise under" federal law and, therefore, is not removable to federal court under 28 U.S.C. §1441. *See* 54 U.S.L.W. 3548 (Feb. 25, 1986).

The principal error of the Court of Appeals' decision is its failure to apply, or even to cite, Section 1828(c)(7)(B) of the Bank Merger Act, which establishes a single, uniform federal antitrust standard, that of the *Sherman* and *Clayton* Acts, set forth in the Bank Merger Act at 12 U.S.C. § 1828(c)(5), for all insured bank mergers (or bank holding company acquisitions),[7] which under the Bank Merger and Bank Holding Company Acts are subject to exclusive federal agency and court review.[8] Subparagraph (A) of 12 U.S.C. § 1828(c)(5) tracks the language of Section 2 of the *Sherman Act*, 15 U.S.C. § 2 (barring any proposed merger "which would result in a monopoly," or which would further a conspiracy or attempt to monopolize the business of banking in any part of the country). Subparagraph (B) of this paragraph tracks the language of Section 1 of the *Sherman Act* and Section 7 of the *Clayton Act*, 15 U.S.C. §§ 1, 18 (barring any proposed merger "whose effect may be substantially to lessen competition, or to tend to create a monopoly, or which . . . would be in restraint of trade.") Virtually identical language is contained in section 3(c) of the Bank Holding Company Act, 12 U.S.C. § 1842(c). In addition, the last sentence of subparagraph (B) provides that even a merger where the effect "may be substantially to lessen competition" shall be approved if the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. § 1828(c)(5)(B).

These uniform federal antitrust standards apply with respect to "any judicial proceeding,"—a phrase not limited

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[7] The Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. §1841 et seq., regulates the acquisition of state and national banks by bank holding companies. *See generally Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S.____, 86 L.Ed.2d 112, 118 (1985).

[8] *See United States v. First City National Bank of Houston*, 386 U.S. 361 (1967).

to cases brought in federal court—under "any antitrust laws"—a phrase not limited to federal antitrust laws, but rather encompassing "any other Acts in pari materia." 12 U.S.C. §1828(c)(8).[9]

The exclusivity of the identical federal standard embodied in both 12 U.S.C. §1828(c)(5) (the Bank Merger Act) and 12 U.S.C. §1842(c) (the Bank Holding Company Act) is well traveled judicial ground and, until this case, had never been put into doubt. For example, in *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981), the Federal Reserve Board had attempted to justify the application of a different competitive standard from that found in §1842(c). The Fifth Circuit disagreed:

> The phrase "substantially to lessen competition" is, of course, borrowed from Section 7 of the Clayton Act. . . . Because this repetition was purposeful, [note omitted] the principles developed under the Clayton Act are applicable to mergers of bank holding companies under Section 1842(c) . . . as well as to mergers of banks under Section 1828(c)(5)(B) of the Bank Merger Act, which uses the same language. . . . [*Id.*, at 1260-61]

Two other Circuits and one other district court have also upheld the exclusivity of this statute. *County National Bank v. Board of Governors*, 654 F.2d 1253 (8th Cir. 1981); *Washington Mutual Savings Bank v. F.D.I.C.*, 482 F.2d 459 (9th Cir. 1973); *Vial v. First Commerce Corp.*, 564 F. Supp. 650 (E.D. La. 1983). The *Vial* case dealt with an

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[9] Thus, the Court of Appeals plainly erred when it concluded: "the law with respect to bank mergers is no more 'exclusively' federal than was the law with respect to interstate transmission of natural gas." 783 F.2d at 368. The whole purpose of the 1966 Bank Merger Act and its companion, the 1966 amendment to the Bank Holding Company Act, was to establish an exclusive and uniform federal standard. *See* fn. 11, *infra*.

identical corporate restructuring as that involved in this case and an almost identical claim of state authority.

In *Washington Mutual Savings Bank v. F.D.I.C.*, *supra*, the Ninth Circuit made a careful analysis of the historical background that gave rise to enactment of the Bank Merger Act. It found that Congress intended that bank mergers be carved out for special treatment, by establishing an unusual scheme of review which required comprehensive competitive reports from not only the Attorney General, but also from the two federal banking agencies not directly responsible for the supervision of the surviving institution. The Circuit Court found that this system insured uniformity and avoided a particular agency's being too lenient or too strict toward bank affiliations. Significantly, the Court also recognized that while Congress incorporated application of the standards of antitrust laws (i.e., the Sherman and Clayton Acts) to bank mergers, it also made an exception to the prescriptive application of those laws by permitting a merger which violated the antitrust laws, where the "convenience and needs of the community to be served" outweighed the anticompetitive effects.

The Congress plainly understood that by enacting the Bank Merger Act it was creating an exclusive federal remedy:

(a) "The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws . . . [*2 U.S Code Cong. & Admin. News* at 1860 (1966).][10]

* * *

(b) "The bill . . . would exempt mergers consummated under the new standards and procedures from attack

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[10] *House Report* No. 1221, Jan 24, 1966, which accompanied H.R. 12173, whose text was enacted into law.

thereafter under any provision of the antitrust laws except the antimonopoly provisions of section 2 of the Sherman Act." [*Id.*]
* * *

(c) "[The bill] would require the courts to use the new standards of the bill in all cases instituted under the antitrust laws. . ." [*Id* at 1861.]
* * *

(d) "[T]his [federal] rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies." [*Id* at 1862.]
* * *

(e) "The bill provides that the courts having jurisdiction over these cases must apply the new standards set forth in paragraph (5) to be applied to all future mergers." [*Id* at 1863.]
* * *

(f) Paragraph 7 "provides a special statute of limitations for antitrust actions, other than those based on the antimonopoly section (sec. 2) of the Sherman Act, arising out of an agency-approved bank merger. Any such action must be commenced during the waiting period [normally 30 days] provided in paragraph (6)." [*Id* at 1865.]
* * *

(g) "Subparagraph (B) requires the courts, in adjudicating the propriety of any merger transaction, to apply the same rule of law that paragraph (5) directs the responsible agencies to apply when initially passing on the question." [*Id.*]
* * *

(h) "For convenience and precision of reference, [paragraph (8)] defines the term "antitrust laws" as the Sher-

man Act, the Clayton Act, and any other acts in pari materia." [*Id* at 1865.][11]

Because it failed to mention Section 1828(c)(7)(B) of the Bank Merger Act or its legislative history, or even to cite the decisions cited above from the other Circuits, the Court of Appeals was not able to apply correctly the controlling Supreme Court removal precedents, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), *aff'g*, 376 F.2d 337 (6th Cir. 1967). In *Franchise Tax Board* this Court indicated that removal is proper "if a federal cause of action completely preempts a state cause of action [because] any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." 463 U.S. at 24. In *Avco* this Court identified the field of labor law as one in which the federal interests expressed in the Labor Management Relations Act of 1947, Section 301, 29 U.S.C. §185 (1982), empowered the courts to create a body of federal law, thus prompting the need for a federal forum.

The federal antitrust laws are another field in which the need for a federal forum has long been recognized by this Court. Since 1922 this Court has mandated that the meaning and application of the *Sherman* and *Clayton* Acts' standards shall be within the exclusive province of the federal courts. *General Investment Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261 (1922). This admonition was

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[11] The language of the antitrust standard in the Bank Holding Company Act follows that of the Bank Merger Act. *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1260 n. 4 (1981)("We may rely on the legislative history of the [1966] amendment to the Bank Merger Act as equally expressing congressional intent as to the construction and purposes of the Bank Holding Company Act amendment [§1842(c), adopted in 1966 as an amendment to the Bank Holding Company Act."] *See* Pub L. No. 89-485, §7, 80 Stat. 237 (1966).

reaffirmed as recently as one year ago in *Maresse v. American Academy of Orthopaedic Surgeons*, 470 U.S. ___, 84 L.Ed.2d 274, 281 (1985) ("[F]ederal antitrust claims are within the exclusive jurisdiction of the federal courts.") Since any cause of action involving the federal antitrust laws is "within the exclusive jurisdiction of the federal courts," removal (followed by dismissal) was required.

Thus, the District Court was correct when it "held that no antitrust challenge to a merger between national banks could be stated under state law." 783 F.2d at 364. Plaintiffs below *did not have the right* to "choose not to assert a federal law that is available and rely only on state law. . . ." 783 F.2d at 365 (quoting 14A *Wright & Miller* §3722). As *Wright and Miller* also states: "Some federal statutes have so strong a preemptive effect that they do more than merely provide a defense to a state law claim. Instead federal law is considered to have taken over an entire subject matter and made it inherently federal." 13B *Wright & Miller* §3566 at 105 (1984). Stated another way, "if federal law occupies the field, all state law in that field is displaced whether or not it impairs federal law, and any cause of action within that field must be tested under federal law." Note, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 665 (1984) (This Note was cited with approval by the Court of Appeals, but its reasoning was misapplied.)

Since the Bank respondents chose to enjoin the merger of two insured national banks, they necessarily raised a federal claim, particularly as the state expressly disclaimed authority. The District Court below thus was obliged to dismiss the action after removal. "[T]he principle of derivative jurisdiction, as it pertains to *subject-matter jurisdiction* of the state court, has been applied so that *any* action, commenced in a state court, involving a matter over which the federal courts have *exclusive* jurisdiction, is subject to dismissal, after removal, for want of jurisdiction . . . . 1A *Moore's Federal Practice*, §0.1 57[3.-2], em-

phasis in original, citing *State of Minnesota v. United States*, 305 U.S. 382 (1939), and *General Investment Co., v. Lake Shore & M.S. Ry Co., supra.*

II. The Decision Below That The Federal Courts Do Not Have Jurisdiction To Determine The Real Nature Of The Plaintiffs' Claim Misconceives The Federal Courts' Duty Under Article III, §2, Of The U.S. Constitution And 28 U.S.C. §§1331 And 1441(a).

The Court of Appeals appears to hold that if the complaint does not *recite* a federal claim (even though a federal claim inheres in the facts stated), the case may not be removed even if the facts stated will not support an additional state cause of action (*e.g.*, where expressly barred by state law, as here). The court presumed without discussion that the plaintiffs' claims were "well-pleaded," apparently because it thought it had to let "the state court . . . make the determination as to the applicability of its state law." 783 F.2d at 367.

But this argument would permit any complainant to force parties to litigate purely federal questions in a state forum at least through the state system once before being forced into the appropriate federal forum. It would require this Court to be the *first* federal forum to review the federal question. Surely such an approach makes no sense in terms of judicial economy. The alternative course would be to permit removal, when there is a federal cause arising out of the facts, to test whether these facts would also support a state claim. If a claim that states a federal cause would not withstand a motion to dismiss the asserted state claim, it was properly removed.

The Court of Appeals' approach conflicts with this Court's own removal precedents and ignores over 150 years of opinions of this Court establishing the rule of Congressional authority over national banks.

A. Where a question as to a federal court's jurisdiction turns on whether a state court has jurisdiction as well,

the federal court has both the jurisdiction and the duty to resolve the issue of state court jurisdiction. Thus, it is often said that the federal courts have "jurisdiction to determine jurisdiction." C. Wright, *The Law of Federal Courts*, § 16 (4th ed. 1983). This Court so ruled in *United States v. United Mine Workers*, 330 U.S. 258, 290 (1947), *citing with approval United States v. Shipp*, 203 U.S. 563, 573 (1906). In this case the Court of Appeals had jurisdiction to decide if the state claims were artfully pled (they were) and if the relevant state statutes expressly deferred to federal law (they do).

1. In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the plaintiff was deemed by the Court to have sought to plead a federal antitrust claim in the form of a state law claim, so as to avoid removal to federal court. This Court "agree[d] [with the lower federal courts] that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum. . .'" 452 U.S. at 396-97 & n.2. Obviously, in *Moitie* this Court did not suggest that it had no jurisdiction to determine the applicability of the purported state law claims.

2. A key part of the New Jersey banking law that plaintiffs sued upon below is N.J. Stat. Ann. § 17.9A-148, which states in relevant part: "a merger or consolidation authorized by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger or consolidation shall be subject to sections 132 through 147 *or to any other law of this State*." (emphasis added.) While the Third Circuit paid lip service to the point that "the state banking laws do not grant the Commissioner of Banking any authority to regulate mergers between national banks," 783 F.2d at 364 n.8, it seemed to suggest that the statute might be deemed by a state court not to apply if the state court found that "the essence of this transaction is an acquisition and thus

that the New Jersey Bank Holding Company Act applies." 783 F.2d at 369. But this reasoning is flawed in two critical respects. First, since the state law draws a jurisdictional line between state and federal jurisdiction at the point *required by federal law* (*see* 12 U.S.C. §§ 214c and 215a(a),[12] the *District Court*, not the state court, was obliged to resolve any factual question as to the nature of the transaction that would determine whether state or federal law applied, so as to resolve the issue of its own jurisdiction.[13] Second, *even if* "an acquisition" had been involved, that fact would not eliminate the same federal question—whether the "acquisition" met the federal antitrust test contained in the federal Bank Holding Company Act. Whatever the remaining utility of state law under Section 7 of the Bank Holding Company Act, 12 U.S.C. § 1846 cannot be deemed to permit state law that conflicts with the Bank Holding Company Act itself. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980) (suggesting that " 'a state could not enact legislation inconsistent with the [Act] and therefore nullify its effect.' ") Thus, since the Bank Holding Company Act contains the same federal antitrust test as that in the Bank Merger

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[12] Thus, a national bank may not merge with a state bank under state charter unless the state allows unfettered merger between a state bank and national bank under the national bank's charter. *Ellis v. State National Bank of Alabama*, 434 F.2d 1182 (5th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[13] In any case the claim that the transaction was an acquisition of bank stock was wholly without merit. As the Third Circuit acknowledged, the stock of NB & T never changed hands. 783 F.2d at 362. It remained the property of its shareholders, insofar as it has physical substance. As an indicium of ownership it was cancelled by operation of law. In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), this Court drew the distinction between mergers and stock acquisitions clearly. In summarizing the pre-1950 case law regarding *Clayton Act*, §7, this Court said: "But the courts found mergers to be beyond the reach of § 7, even when the merger technique had supplanted stock acquisitions as the prevalent mode of corporate amalgamation." 374 U.S. at 338-39.

Act, it could not matter here whether the transaction was structured as a merger or an acquisition. Under either method the *federal* antitrust law applies, and since the federal courts have exclusive jurisdiction over the federal antitrust laws (see discussion at pages 17-18, *supra*), the action was for that reason removable.

B. The national banking system, since the seminal case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), has been deemed by this Court to be a "part of the supreme law of the land," *Id.* at 424, which cannot be regulated by the states except to the degree and extent that Congress permits. "[T]he authority of Congress to act in the [banking] field was resolved in the landmark case of McCulloch v. Maryland . . . [and] [t]he paramount power of the Congress over national banks has, therefore, been settled for almost a century and a half." *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), the Supreme Court stated:

> [T]he Federal Government is a rival chartering authority for banks. Since *M'Culloch v. Maryland* (U.S.) 4 Wheat. 316, 4 L.ed. 579, it has not been open to question that the Federal Government may constitutionally create and govern such institutions within the states. The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositaries. [347 U.S. at 375.]

The role of the states with respect to national banks is limited to that which Congress has prescribed. As the Supreme Court stated in *Franklin National Bank*, *supra*, 347 U.S. at 378:

> We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances.

The supremacy of Congress over the affairs of national banks was reiterated in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 (1969), a case concerning the applicability of a state branching law.[14] It stated:

> At the outset we note that, while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks.
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> * * *
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> . . . [T]he threshold question of [defining the term "branch"] is to be determined as a matter of federal law. . . . [396 U.S. at 131, 134.]

In *Howell v. Citizens First National Bank*, 385 F.2d 528, 530 (3rd Cir. 1969), a state banking commissioner sued to enjoin a national bank from operating a second branch in a community, alleging that opening the branch violated state law that was applicable to national banks. When the District Court stayed the proceedings pending institution of a suit in state court to determine the applicability of the state law, the Third Circuit reversed, holding that the applicability of the state law was purely a matter of federal

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[14] State restrictions on branch banking by national banks are based upon express Congressional authority pursuant to the McFadden Act, 12 U.S.C. §36(c). See *First National Bank of Logan, Utah v. Walker Bank & Trust Co., supra.* Application of those state restrictions is purely a federal question removable to federal court. *See, e.g., North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (10th Cir. 1972).

law. Referring to 12 U.S.C. §36(c), adopted by the Banking Act of 1933, the Third Circuit held:

> Thus the determination of the extent of the application of a state branch banking statute to a national bank under the federal Banking Act of 1933 is purely a question of federal law, a question to be decided by reading the state statute through lenses prescribed by the Congress. [385 F.2d at 530.]

It concluded:

> It will thus be seen that the present case involves a purely federal question, the meaning of the New Jersey branch banking statute for the purposes of clause (2) of paragraph (c) of Section 5155 of the Revised Statutes, as amended, and under the interpretive criteria laid down in that clause . . . The question is accordingly one which the district court should proceed to consider and decide, and as to which its abstention in favor of the state courts is not appropriate. [385 F.2d at 531.]

The supremacy of federal banking law and its federal administrators, such as the Comptroller, with respect to state banking laws as they affect national banks has been acknowledged in many recent cases. *See e.g., Ramapo Bank v. Camp*, 425 F.2d 333, 346 (3rd Cir.), *cert. denied*, 400 U.S. 828 (1970) (state law restrictions do not govern the non-branching functions of national banks); *First National Bank of Fairbanks v. Camp*, 465 F.2d 586, 595, 597 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973) ("[T]here is authority for the view that the Comptroller's interpretation of the state statute is, under Section 36, purely a question of federal law"); *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 890 (9th Cir. 1980) ("The Comptroller makes an independent interpretation of the state law"); *American Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999,

1005 (6th Cir. 1982) ("The Comptroller was required to make an independent determination of the meaning of the applicable state law"); *Rogers v. First National Bank of St. George*, 297 F. Supp 641, 645 (D. S.C.) (The merger of two national banks "is governed and controlled by the applicable Federal Statutes and regulations, not by State law,") *aff'd and remanded on other grounds*, 410 F.2d 579 (4th Cir. 1969).

And in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in which this Court held that a Federal Home Bank Board regulation authorizing due-on-sale clauses in federal savings and loan instruments preempted state laws imposing limitations on the due-on-sale practices of federal savings and loan associations, the Court stated:

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co. 430 U.S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." Rice v Santa

> Fe Elevator Corp., 331 U.S. 218, 230 (1947). [458 U.S. at 152-53.]

It is readily apparent that the Court of Appeals, unwittingly, has done much more than merely mistakingly remand a case to state court. It has held that the states may regulate (or forbid) the merger of national banks—an activity heretofore subject to exclusive Congressional control. It has held that different antitrust standards—conceivably 50 different antitrust standards—from those of the *Bank Merger* and *Bank Holding Company Acts* can govern the amalgamation of insured banks. Finally, it has held that the *Sherman Act* and *Clayton Act* standards of the *Bank Merger* and *Bank Holding Company Acts* can be—perhaps—interpreted and applied by 50 different state court systems. These holdings are more than a departure from prior opinions of this Court. They represent a dismantling of the supremacy of the laws of the United States in the fields of national banking and federal antitrust policy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.[15]

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[15] In view of the Court of Appeals' failure to consider the Bank Merger Act and its legislative history, it is respectfully suggested that this Court may wish to reverse the decision below summarily and remand with a direction for the Court of Appeals to apply the Bank Merger Act to this case by entering an order of dismissal pursuant to the statute of limitations provided in the Bank Merger Act. 12 U.S.C. § 1828(c)(6).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5525

UNITED JERSEY BANKS; UNITED JERSEY BANK/SOUTHWEST; CONSTELLATION BANCORPORTION; THE NATIONAL STATE BANK; HORIZON BANCORP; PRINCETON BANK; NEW JERSEY NATIONAL CORPORATION; NEW JERSEY NATIONAL BANK; UNITED COUNTIES BANCORPORATION; and UNITED COUNTIES TRUST COMPANY,

Appellants,

v.

MARY LITTLE PARELL, Commissioner of Banking of the State of New Jersey; FIRST FIDELITY BANK, N.A., SOUTH JERSEY; COMMUNITY BANCSHARES CORPORATION; and NATIONAL BANK AND TRUST COMPANY OF GLOUCESTER COUNTY

On Appeal from the United States District Court for the District of New Jersey (Trenton)

(D.C. Civil No. 85-2783)

Argued November 18, 1985
Before: HIGGINBOTHAM, SLOVITER and MANSMANN, Circuit Judges
(Filed February 14, 1986)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This case presents a significant issue regarding the scope and propriety of removal to federal court on the basis of what is essentially a claim of federal preemption. To reach that issue, we must traverse the maze of state and federal legislation on bank mergers, acquisitions and bank holding companies.

Plaintiffs are attempting to use state law to prevent a merger between two nationally chartered banks. The plaintiffs (hereafter "United Jersey") are five New Jersey bank holding companies and the subsidiary banks of each. The defendants are the merging banks, First Fidelity Bank, N.A., South Jersey, and the National Bank & Trust Company of Gloucester County ("NB & T"), and their respective parent holding companies, First Fidelity Bancorporation and Community Bancshares Corporation. All four defendants will be collectively referred to as "First Fidelity" unless otherwise noted. United Jersey also sued the New Jersey Commissioner of Banking, Mary Little Parell, seeking to enjoin her to exert her authority over the merger.

Plaintiffs originally filed their action in New Jersey state court, but defendants removed it to the United States District Court for the District of New Jersey. The district court denied United Jersey's motion to remand and thereafter dismissed the action as premature. The principal issue before us is whether federal jurisdiction existed to support removal.

I.

The transaction at issue in this case was structured as a merger between two nationally chartered banks.[1] NB & T

[1] After the briefs were filed in this case, the parties informed the

was merged into First Fidelity Bank. As consideration, NB & T shareholders received shares of First Fidelity's parent corporation, First Fidelity Bancshares [sic]. After being presented for verification, N B & T's shares ceased to exist without actually changing hands. Prior to the transaction, NB & T's parent corporation, Community Bancshares, also ceased to exist.

Pursuant to its obligations under the federal banking laws, First Fidelity filed a merger application with the Comptroller of the Currency, who must approve all mergers of insured banks in which the resulting bank is a national bank. See 12 U.S.C. § 1828(c)(2)(A). Three of the plaintiffs in this case filed formal protests against the merger with the Comptroller. As required by 12 U.S.C. § 1828(c)(4), the Comptroller requested reports from the Department of Justice and the Board of Governors of the Federal Reserve System concerning the anticompetitive effect of the merger. Both filed reports which predicted no significant anticompetitive effects from the merger. On August 29, 1985, the Comptroller approved the merger.

Under the federal Bank Merger Act, anyone seeking to challenge a merger between nationally chartered banks on the ground that the merger violates either the Sherman or Clayton Acts must file suit within thirty days after the Comptroller's approval. 12 U.S.C. § 1828(c)(6) & (7)(A).[2] If no such action is filed, the Comptroller's decision be-

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court that the merger had been consummated. We assume for purposes of this decision that the merger took place as described in the documents submitted by the parties.

At the request of the appellants, this court had expedited briefing and argument in this case. However, the parties delayed two months in providing the court with the transcript of the argument that it had requested.

[2] The one exception to this limitation is that suits challenging mergers on the ground that they violate section 2 of the Sherman Act, 15 U.S.C. § 2, need not be filed in this thirty day "window". See 12 U.S.C. § 1828(c)(7)(C).

comes final, and the merger may be consummated. *Id.* § 1828(c)(6) & (7)(A).

In this case, no challenge under the federal antitrust laws was filed during the thirty-day limitation period. On September 29, 1985, the limitation period expired. Immediately thereafter the merger took place. Plaintiffs concede that they deliberately chose not to challenge the merger under federal law.

However, even before the Comptroller's decision, plaintiffs sought to use state law to block the merger by petitioning the New Jersey Commissioner of Banking, Parell, to hold a hearing on the merger. In a letter dated July 1, 1985, the Commissioner held that she did not have jurisdiction over this merger, because in her view, New Jersey had disclaimed any intention to regulate mergers between national banks. United Jersey appealed this denial to the state courts, but no decision had been rendered at this time this case was briefed.

Using yet another tactic, United Jersey filed this suit in New Jersey Superior Court, Chancery Division, alleging two causes of action under state law. The theory of United Jersey's complaint was that despite the form of the merger, it actually was an acquisition of NB & T by First Fidelity Bancshares, [sic], the holding company. The first count of United Jersey's complaint alleged that the transaction violated a provision of the New Jersey Bank Holding Company Act, N.J. Stat. Ann. § 17:9A-345(a). In general terms, this statute prohibits any company owning more that 25% of the stock of any bank in New Jersey from acquiring more than 10% of another New Jersey bank if the acquiring bank would then own more than 20% of the bank deposits in the state.[3] The complaint alleged that after the

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[3] The statute provides as follows:

> Except as otherwise provided by sections 3 and 4 of this act, (a)No company which owns more than 25% of the stock of any

acquisition, the aggregate deposits of the resulting institution would exceed this 20% state imposed cap. Another section of the New Jersey banking laws, N.J. Stat. Ann. § 17:9A-347, allows companies to exceed this 20% deposits cap if the acquisition occurs by way of a merger.[4] United Jersey's complaint sought to avoid the force of this provision by arguing that it was counter to the policy expressed in § 345, and therefore, that the New Jersey legislature had repealed it by implication.[5]

United Jersey's complaint also charged that the merger would restrain commerce and tend to create a monopoly in violation of provisions of the New Jersey Antitrust Act, N.J. Stat. Ann. § 56:9-4. This statute disclaims regulation of "[t]he activities of any State or national banking insti-

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bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next preceding such acquisition.

N.J. Stat. Ann. 17:9A-345(a).

[4] N.J. Stat. Ann. 17:9A-347 provides:

> Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 of this act, if such acquisition results from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

[5] Specifically, United Jersey argues that the exception to § 345 contained in § 347 was inadvertently left in the statute when the New Jersey legislature amended § 345 in 1968 to allow partial ownership of banks by holding companies. According to United Jersey, leaving the § 347 exception intact effectively undermines the limitation in § 345. *See* Brief for United Jersey at 6. Whether the New Jersey legislature did intend to repeal § 347 is, of course, a question of state law.

tution to the extent that such activities are regulated . . . by . . . the Federal Government under the banking laws of the United States." N.J. Stat. Ann. § 56:9-5(b)(7). United Jersey's complaint argued, however, that the transaction had been structured to avoid federal regulation and, therefore, that this exemption did not apply.

The complaint sought relief in the form of a declaration that the New Jersey banking and antitrust laws applied to the merger and that the merger would violate these laws. United Jersey also sought an injunction against the consummation of the merger. Finally, United Jersey asked for a declaration that the Commissioner of Banking had authority over the merger and an injunction against the Commissioner prohibiting her from approving the transaction.

The corporate defendants removed the action to federal court.[6] At the same time, they moved to dismiss the complaint for failure to state a claim upon which relief could be granted. United Jersey then cross-moved for a remand to the state court.

The district court denied the petition to remand and granted the motion to dismiss. The court rejected United Jersey's characterization of the transaction as an acquisition of a national bank by a holding company, and instead, characterized it as a merger between two national banks. The court interpreted a provision of the New Jersey

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[6] The Attorney General of New Jersey, representing the New Jersey Commissioner of Banking, refused to join the petition for removal. The Attorney General took the position that the complaint did not state a claim either under federal or state law. United Jersey argues that the Commissioner's failure to join the petition renders it fatally deficient and requires that the action be remanded to state court. *See* Tri-Cities Newspaper, Inc. v. Tri-Cities Printing Pressman & Assistants', Local 349, 427 F.2d 325, 327 (5th Cir. 1970)(all but "nominal" parties must join a petition for removal). Because of the view we take of the case, we need not decide this issue.

banking laws, N.J. Stat. Ann. § 17:9A-148B,[7] which on its face applies only to mergers of state banks into national banks, as reflecting New Jersey's recognition that "mergers into national banks under national bank charters are beyond the power of the state to regulate." *See* App. at 30a.[8] The court concluded that the state has no role with respect to the merger and also rejected plaintiffs' efforts to bring the transaction under the federal Bank Holding Company Act which permits some continued state regulation. The court also held that no antitrust challenge to

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[7] This statute provides as follows:

> B. One or more banks may, without the approval of the commissioner or any other officer, department, board or agency of this State, merge into or consolidate with a national banking association under the charter of such association, with the approval of the holders of at least 2/3 of the capital stock of each such bank entitled to vote. A majority of the directors of each such bank shall, within 10 days after such approval had been given, file in the department a certificate over their signatures that such approval has been given, and that the bank intends to act in pursuance thereof. *Except as otherwise provided in subsection D. of this section, a merger or consolidation authorized by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger or consolidation shall be subject to sections 132 through 147 or to any other law of this State*; but a copy of the agreement or merger or consolidation certified by the comptroller of the currency shall be evidence, and may be recorded, as provided by section 138. Upon the taking effect of the merger or consolidation, the bank shall be deemed to have surrendered its charter.

N.J. Stat. Ann. § 17:9A-148(B) (emphasis added). For purposes of this section, the New Jersey banking laws define "bank" only to include state-chartered banks. See N.J. Stat. Ann. § 17:9A-1(1).

[8] The Attorney General's brief agrees with plaintiffs that section 148(B) applies only to mergers of state banks into national banks, but also notes that the state banking laws do not grant the Commissioner of Banking any authority to regulate mergers between national banks. *See* Brief on Behalf of Mary Little Parell, Commissioner, New Jersey Department of Banking at 7.

a merger between national banks could be stated under state law. Thus, according to the district court, "the [plaintiffs] necessarily [are] stating a federal cause of action. . . .' " App. at 31a (quoting 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3722 at 271-273 (1985)(hereafter "Wright & Miller")). The court further stated that this was a case "in which the state law which plaintiffs invoke expressly indicates that Federal law controls the question they raise." App. at 32a. Therefore, federal jurisdiction existed and removal was proper.

With federal jurisdiction established, the court turned to First Fidelity's motion to dismiss. At the time of the district court's decision, the Comptroller of the Currency had not yet approved the merger. Thus, United Jersey's "necessarily" federal cause of action challenging the merger on federal antitrust grounds, which the court viewed as the only cause of action plaintiffs could assert, was premature and the court dismissed it.

In this appeal, United Jersey presses its contention that there is no federal jurisdiction to support removal of its complaint. In this argument, United Jersey is joined by the Attorney General of New Jersey, who in the alternative supports the district court's decision to dismiss if this court finds jurisdiction.

II.

Appellants argue that removal was improper because their complaint filed in state court was based on state law claims. They argue that the district court erred in permitting removal on the basis of what was, in effect, a federal defense, i.e. defendants' contention that federal statutes rather than state law governs the merger of two national banks.

It is one of the settled principles of federal jurisdiction jurisprudence that the federal question must appear on the face of the complaint, and that federal jurisdiction cannot

be created by anticipating a defense based on federal law. *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). An anticipated defense of federal preemption cannot provide a basis for removal, *see Trent Realty Associates v. First Federal Savings & Loan Association*, 657 F.2d 29, 34-35 (3d Cir. 1981), expressly approved in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 n.11 (1983).

As the Supreme Court recently reaffirmed, where there is no diversity of citizenship between the parties, "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts. . ." *Franchise Tax Board*, 463 U.S. at 8.[9] Federal question jurisdiction exists if the action "arises under" the "Constitution, laws, or treaties of the United States." See 28 U.S.C. § 1331.

To determine whether a case "arises under" federal law, a court must look to the allegations of the plaintiff's "well-pleaded complaint." *Franchise Tax Board*, 463 U.S. at 10. As generally interpreted, "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause

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[9] Removal in this case is governed by 28 U.S.C. § 1441(a) & (b), which provide:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

of action." *Id.* at 10-11 (quoting *Gully v. First National Bank*, 299 U.S. 109, 112 (1936)). *See also New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891, 892 (3d Cir. 1984). A corollary of this rule is that the "plaintiff is master of his claim and may choose not to assert a federal right that is available and rely only on state law. . ." 14A Wright & Miller 3722 at 266-68 (citing *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22 (1913)).

Application of these principles to this case suggests that removal was improvident. United Jersey relied on state law in its complaint, which usually signifies that the claim does not arise under federal law. Not surprisingly, the issue is not as straightforward as the black letter law appears.

In *Franchise Tax Board*, Justice Brennan, writing for a unanimous court, referred to two situations where federal jurisdiction could be available even though plaintiff based its claim in state court on state law: (1) when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims" or (2) when it appears that plaintiff's claim "is 'really' one of federal law." 463 U.S. at 13.

The parameters of the "substantial disputed question of federal law" situation are not easily drawn. In *Franchise Tax Board*, a state Board filed suit in state court against a trust administering an employee welfare benefit plan seeking damages for the trust's failure to honor the Board's levies on account of unpaid taxes by employee beneficiaries and seeking a declaratory judgment that the state's power to levy on funds held in trust was not preempted by ERISA. The Supreme Court held that removal of the action to federal court was improper, since it was not within the removal jurisdiction conferred by 28 U.S.C. § 1441. The Court recognized that the question of federal preemption was "a necessary element of the declaratory judgment claim" since the only questions in the dispute between the

parties concerned the rights and duties of the trustees under ERISA. The state Board could not obtain the declaratory relief it sought "without a construction of ERISA and/or an adjudication of its pre-emptive effect and constitutionality—all questions of federal law." 463 U.S. at 14.

Nonetheless, the Court held that federal jurisdiction was unavailable even though the trust, had it so sought, could have filed in federal court the mirror image suit, one for a declaration of its rights and duties under ERISA.[10] The Court looked to the "'current of jurisdictional legislation'" since 1875 "with an eye to practicability and necessity." Id. at 20 (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950)). Careful examination of the framework of the Court's analysis of the "substantial, disputed question of federal law" issue, set forth in Part III A of that opinion, *see id.* at 13-22, manifests that the Court was not enunciating a new basis for federal jurisdiction but instead was reaffirming the traditional well-pleaded complaint test "until Congress informs us otherwise." *Id.* at 22.

Although the Court was cognizant that adherence to earlier principles that limit federal jurisdiction may produce "awkward results," particularly where the only question for decision is raised by a federal preemption defense, the Court reaffirmed the principles of *Skelly Oil Co. v. Phillips Petroleum Co.* that focus must be on the underlying cause of action as set forth in the well-pleaded complaint, and of *Gully v. First National Bank* that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." 299 U.S. at 116 *quoted in Fran-*

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[10] On the same day that it decided *Franchise Tax Board*, the Supreme Court held in Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), that employers could bring a federal suit claiming that certain state laws were preempted by ERISA.

chise Tax Board, 463 U.S. at 12. *See id.* at 22. Thus, it is not enough that there be a "substantial, disputed question of federal law." It is only if that question also "is a necessary element of one of the well-pleaded state claims" that federal jurisdiction can be found.

When viewed under the well-pleaded complaint test, the United Jersey complaint presents less, rather than more, basis for finding federal jurisdiction than did the complaint in *Franchise Tax Board*. United Jersey's first count alleges that, whatever its form, the transaction at issue is actually an acquisition of a bank, NB & T, by a holding company, First Fidelity Bancorportion, and that the New Jersey Bank Holding Company Act (which defines "bank" to include state and national banks, *see* N.J. Stat. Ann. § 17:9A-344(a)) prohibits the acquisition because the resulting deposits will exceed the statutory cap. The cause of action alleged patently is derived from state law. The second count alleges the acquisition violates the New Jersey Antitrust Act. As in the second count of the *Franchise Tax Board* complaint, this count refers to federal law not to establish its claim but merely to negate jurisdiction thereunder.

Neither count affords a basis for finding that plaintiffs' "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties". *Franchise Tax Board*, 463 U.S. at 13. There may be some basis to agree with defendants that United Jersey's view of the state law is incorrect and will be so found. It is, however, for the state court to make the determination as to the applicability of its state law.

The second situation for finding federal jurisdiction referred to in *Franchise Tax Board*, i.e. where the state claim pleaded is "really one" of federal law, is not as difficult to apply because there is ample precedent to illustrate its scope. As explained by Justice Brennan, "it is an independant corollary of the well-pleaded complaint rule

that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Board*, 463 U.S. at 22. This same principle has been referred to elsewhere as the "artful pleading" doctrine, under which a court will not allow a plaintiff to deny a defendant a federal forum when the plaintiff's complaint contains a federal claim "artfully pled" as a state law claim. *See* 14A Wright & Miller § 3722 at 270; *Eitmann v. New Orleans Public Service*, Inc., 730 F.2d 359, 365 (5th Cir.), *cert. denied*, 105 S. Ct. 433 (1984).

The Court in *Franchise Tax Board* distinguished the case before it from cases where the "real" nature of the claim is federal, which it illustrated by reference to *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557 (1968). The complaint in *Avco* was filed in state court by an employer seeking to enjoin the union and its members from striking in violation of a "no-strike" clause in the collective bargaining agreement. Although the complaint did not invoke federal law, it was clear to the Court that the action "arose under" § 301 of the Labor Management Relations Act because of the powerful preemptive force of § 301 which displaced entirely any state cause of action for violation of a contract between an employer and a labor organization. As Justice Brennan explained "[a]ny such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Board*, 463 U.S. at 23. In contrast, the suit filed by Franchise Tax Board did not "arise under" ERISA since that statute gave the state no right to seek the relief it pressed.

Using similar reasoning, United Jersey's suit does not "arise under" any federal statute. The fact that United Jersey's claim under state law may be defeated because of the preemptive effect of federal banking laws does not mean that such federal laws provide the basis of the cause of action, as in the case of § 301 of the LMRA.

It appears that it was the artful pleading doctrine that was the basis of the district court's conclusion that federal jurisdiction existed in this case. That court referred to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the paradigmatic case of "artful pleading". The *Moitie* action which had been removed from state court tracked an earlier federal antitrust action by the same plaintiff that had been dismissed for failure to state a claim. In concluding in a footnote that there was federal jurisdiction over the removal action, the Court held that the claims had "sufficient federal character to support removal," and endorsed the "artful pleading" doctrine as a "settled principle." *Id.* at 397 n.2 (quoting 14A Wright & Miller § 3722 at 564-66 (1976)).

Unless applied with circumscription, the artful pleading doctrine may raise difficult issues of federal-state relations. An expansive application of the doctrine could effectively abrogate the rule that a plaintiff is master of his or her complaint. *Hunter v. United Air Lines*, 746 F.2d 635, 640 (9th Cir. 1984), *cert. denied.*, 106 S.Ct. 180 (1985). Those courts of appeal that have applied the doctrine have done so primarily in the context of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, not only because the extent of federal primacy is well established, see *Hillard v. Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985); *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 344 (7th Cir. 1985), but because all state law is displaced.

Whatever the ultimate limits of the artful pleading doctrine, this case is governed by the general rule that federal jurisdiction will not be found when the complaint states a prima facie claim under state law. See *Guinasso* v. *Pacific First Federal Savings & Loan Association*, 656 F.2d 1364, 1367 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). First, this is not a case like *Moitie* in which the plaintiff first filed a lawsuit containing federal claims and then, after dismissal, sought to recast those claims under state law. Here, plaintiff has consistently sought to litigate state

claims in state court. *Cf. Powers v. South Central United Food & Commercial Workers Union and Employers Health & Welfare Trust*, 719 F.2d 760, 766 (5th Cir. 1983). Indeed, in this case, United Jersey apparently has foregone its federal remedies to pursue relief in state court. Moreover, there is no indication in the record that United Jersey brought this state action to foreclose First Fidelity's access to a federal forum to litigate federal issues. *See* 14A Wright & Miller 3722 at 266.

The district court seemed to rely on the "exclusivity" of federal law to displace both Count One of United Jersey's complaint alleging New Jersey's banking laws prohibited the transaction and Count Two alleging the transaction violated New Jersey's antitrust law. Although the district court disclaimed relying on federal preemption, that was the practical effect of its holding. The district court's action is thus irreconcilable not only with the holding in *Franchise Tax Board* but with the stream of authority in that Court and in the courts of appeals. Even though the preemptive effect of federal legislation has already been established, a state claim does not thereby "arise under" federal law nor is the state court without jurisdiction on that basis. For example, although the Natural Gas Act had already been held to preempt state law on the issue of wholesale natural gas price, the Court held that a contract price dispute filed in state court was not within the original jurisdiction of the federal courts. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961). It was immaterial that plaintiff could have elected to proceed on a federal ground. *Id.* at 663. The state claims asserted "do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Id.*

Unlike federal labor relations law, the law with respect to bank mergers is no more "exclusively" federal than was the law with respect to interstate transmission of

natural gas. In the case of labor relations, the entire field has been occupied by the federal statute, whereas in the other areas the nature and operation of the federal and state laws must be examined to determine if they can operate compatibly. *See* Note, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 664-66 (1984).

We need not decide whether a completely frivolous or baseless claim under state law would justify a federal court in dismissing on the merits rather than remanding. Whatever the ultimate decision on the merits, we are not faced with such a claim.

Under United Jersey's theory expressed in Count One, federal law does not displace state law. Arguably, a New Jersey court could find that the essence of this transaction is an acquisition and thus that the New Jersey Bank Holding Company Act applies. As the state points out, and as our recent decision in *Girard Bank v. Board of Governors of the Federal Reserve System*, 748 F.2d 838 (3d Cir. 1984) recognizes, a transaction may have attributes of both a merger and a stock acquisition, and thereby be subject to review by more than one agency.

In the context of bank holding company regulation, federal law explicitly preserves state law. *See* 12 U.S.C. § 1846. It is not determinative that United Jersey may not prevail in its contention that the New Jersey Bank Holding Company Act prohibits the transaction at issue. Federal jurisdiction does not depend in the merits of the plaintiff's complaint.

Significantly, defendant Parell, Commissioner of the New Jersey Department of Banking, who disagrees with United Jersey's claim on the merits, nonetheless agrees that removal was improper. After detailing the origins and operation of the dual banking system, her brief argues that

> [w]ith this background in mind, it becomes clear that plaintiffs' complaint *does* state a separate claim under state law, apart from any claim concerning the illegality of the bank merger; specifically, that the New Jersey BHCA prohibits the acquisition of [NB & T] Gloucester Bank by First Fidelity Bancorporation. If the plaintiffs are correct in their contention in this regard, and the State reiterates its conviction, expressed to the District Court, that they are *not*, it seems logically to follow that the State court would have jurisdiction either to enjoin the acquisition (without technically infringing upon the Comptroller's authority to rule upon the merger) or, at the very least, to declare what the New Jersey law means and how it applies, or does not apply, in the context of the instant controversy.

Brief of Appellee Parell at 11.

With respect to Count Two, although United Jersey's allegation that the transaction will violate the New Jersey Antitrust Act may seem tenuous in light of the explicit exemption from its prohibitions for the activities of banks to the extent such activities are regulated by federal law, it is not clear that the New Jersey courts would treat this as a case to which New Jersey law does not extend. Congress has allowed the states to retain extensive authority to legislate in the antitrust field. *See* 1 P. Areeda & D. Turner *Antitrust Law* ¶ 208 at 58 (1978). The New Jersey Supreme Court has specifically held that the New Jersey Antitrust Act is not preempted by federal law. *See State v. Lawn King, Inc.*, 84 N.J. 179, 191, 417 A.2d 1025, 1032 (1980). First Fidelity has not directed our attention to any New Jersey case that conclusively rejects the theory underlying the antitrust claim of Count Two of United Jersey's complaint.[11] In such a case, it should be for the New

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[11] Other cases finding federal jurisdiction for state antitrust challenges

Jersey courts, in the first instance, to determine whether the count alleging violation of state antitrust law is without any facial validity.

Our conclusion that removal of United Jersey's action was improper does not mean that there are not good reasons to support the holding that the district court made. It may well be that federal courts should be appropriate removal fora when state actions will inevitably require decisions on federal law. However, as Justice Brennan stated, "for reasons involving perhaps more history than logic," *Franchise Tax Board*, 463 U.S. at 4, that choice is for Congress.

III.

We conclude, therefore, that the district court did not have jurisdiction over this case, and thus that United Jersey's motion to remand was improperly denied. In so deciding, we of course express no opinion on the merits of United Jersey's state law claim.[12] Accordingly, the decision of the district court will be reversed and the case will be remanded to that court so that it can remand the action to the New Jersey Superior Court from which it was removed.

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are distinguishable. In In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D. N.Y. 1980), the state antitrust statute had been interpreted to apply only to intrastate commerce and the plaintiffs sought to claim violations of the state law based on interstate commerce. Similarly, in Three J. Farms, Inc. v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980), the plaintiff sued under a narrowly interpreted state law to redress wide ranging interstate anticompetitive behavior. In both cases federal class actions against the same defendants were already pending.

[12] First Fidelity argues that the Comptroller's approval and the subsequent consummation of the merger rendered this case moot. In light of our holding that the district court had no subject matter jurisdiction, we do not reach the mootness issue. First Fidelity, of course, will be free to contend before the state court that this case is now moot.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5525

UNITED JERSEY BANKS *et al.*,

Appellants

v.

MARY LITTLE PARELL, etc. *et al.*

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by Appellees, First Fidelity Bancorporation; First Fidelity Bank, N.A., South Jersey; Community Bancshares Corporation; and National Bank and Trust Company of Gloucester County,
in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/DOLORES K. SLOVITER

Circuit Judge

Dated: March 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5525

UNITED JERSEY BANKS, *et al.*
vs.
MARY LITTLE PARELL, etc.

United Jersey Banks, etc., *Appellants*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above case be, and it is hereby stayed until April 17, 1986.

/s/DOLORES K. SLOVITER
Circuit Judge

Dated April 1, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 85-2783

UNITED JERSEY BANKS; UNITED JERSEY BANK/SOUTHWEST; CONSTELLATION BANCORPORATION; THE NATIONAL STATE BANK; HORIZON BANCORP; PRINCETON BANK; NEW JERSEY NATIONAL CORP.; NEW JERSEY NATIONAL BANK; UNITED COUNTIES BANCORPORATION; and UNITED COUNTIES TRUST COMPANY

Plaintiffs,

vs.

MARY LITTLE PARELL, Commissioner of Banking of the State of New Jersey; *et al.,*

Defendants.

ORDER

The parties having moved for various relief and the court having considered the papers submitted and the argument of counsel, and in accordance with the opinion dictated into the record today,

It is on this 31st day of July, 1985,

ORDERED that the Complaint be and the same hereby is dismissed; and it is further

ORDERED that the motion to remand this action to the state court is denied; and it is further

ORDERED that the cross-motions for sanctions are denied.

/s/MARYANNE TRUMP BARRY
Maryanne Trump Barry
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 85-2783

UNITED JERSEY BANK, *et al*,

Plaintiffs,

vs.

MARY LITTLE PARRELL, *et al*,

Defendants.

Trenton, New Jersey
July 31, 1985

OPINION

B E F O R E:

THE HON. MARYANNE TRUMP BARRY, U.S.D.J.

A P P E A R A N C E S:

GREENBERG, KELLEY & PRIOR, ESQS.,
Attorneys for Plaintiffs,
BY: WILLIAM GREENBERG, ESQ., and
JAMES F. SCHWERIN, ESQ.

ROBERT M. JAWORSKI, Deputy Attorney General,
Attorney for Defendant Parell.

LOWENSTEIN, SANDLER, BROCHIN, KOHL, FISHER BOYLAN & MEANOR, ESQS.,
BY: STEPHEN N. DERMER, ESQ.,
and
METZGER, SHADYAC & SCHWARTZ [sic], ESQS.,

BY: EUGENE J. METZGER, ESQ. (D. C. Bar),
Attorneys for Defendants.

THE COURT: In this action, Plaintiffs, who include bank holding companies, state chartered banks and federally chartered banks, seek to block a proposed merger, described in the complaint as an "acquisition," between Defendants First Fidelity Bank, N.A., South Jersey (First Fidelity) and National Bank and Trust Company of Gloucester County (Gloucester County), two national banking associations. To this end, Plaintiffs filed suit in the Superior Court of New Jersey, Chancery Division, seeking a declatory [sic] judgment and other equitable relief, including permanently enjoining the proposed "acquisition." That action was removed to this Court, where it is now the subject of a motion to dismiss by Defendants and a cross motion to remand by the Plaintiffs. For the reasons set forth below, Plaintiffs' motion to remand will be denied, and Defendants' motion to dismiss will be granted.

In their complaint, Plaintiffs invoke various New Jersey banking laws as well as the State Antitrust Act in support of their attempt to prevent the aforesaid "acquisition." First, Plaintiffs claim that under N.J.S.A. 17:9A-355 et seq., that acquisition is subject to the approval of the New Jersey Commissioner of Banking, who is a named Defendant in this action. Further, Plaintiffs claim that N.J.S.A. 17:9-A-345(a), New Jersey's "cap" law, applies to the proposed acquisition, despite the fact that N.J.S.A. 17:9A-347 explicitly exempts mergers and consolidations from coverage by 345(a). Finally, Plaintiffs aver that the proposed "acquisition" will violate N.J.S.A. 56:9-4, a provision of the New Jersey Antitrust Act.

Having set forth these claims, Plaintiffs demand judgment:

One, declaring that, as set forth in New Jersey's cap law, bank holding companies may not acquire ownership

of more than 10 percent of the stock of two or more banks in the State of New Jersey with aggregate average deposits exceeding 20 percent of the aggregate average deposits of all banks in New Jersey other than savings banks whether the means of acquisition be by purchase, merger, consolidation, or otherwise;

Two, declaring that N.J.S.A. 17:9A-347, which, I note, exempts mergers from the cap law, has been repealed by implication;

Three, declaring that acquisition of a national banking association by a bank holding company through an exchange of stock is subject to approval by the New Jersey Commissioner of Banking;

Four, declaring that it is against the public policy of the State of New Jersey for the Commissioner of Banking to approve an acquisition by any bank holding company, through any means, of more than 10 percent of the stock of any bank within New Jersey which will result in ownership of more than 10 percent of stock of two or more banks with aggregate average deposits of all banks in New Jersey other than savings banks;

Five, enjoining the Commissioner of Banking of New Jersey from approving the acquisition of Gloucester County by First Fidelity Bancorporation; Six, permanently enjoining the acquisition of National Bank & Trust Co. of Gloucester County by First Fidelity Bancorporation.

Plaintiffs also seek attorneys' fees, filing fees, and costs of suit.

In addition to First Fidelity and Gloucester County, Plaintiffs' State Court complaint named as Defendants Mary Little Parell, the New Jersey Banking Commissioner; and First Fidelity Bancorporation and Community Bancshares Corporation, the holding companies of which First Fidelity and Gloucester County, respectively, are subsidiaries. With the exception of Defendant Parell, all

Defendants removed this action to this Court, asserting that it raised a Federal question. These Defendants simultaneously filed this motion to dismiss, asserting that Plaintiffs' claims fail to state a claim upon which relief can be granted in that those claims, predicated on State law, are pre-empted by Federal banking and antitrust law. By way of response, Plaintiffs filed their cross motion to remand this action to State Court, asserting that it raised purely state law claims to which pre-emption merely provides a defense.

Plaintiffs argue that the complaint sounds solely in State law for violations of the State Statute regarding bank holding companies, which has its Federal counterpart in the Bank Holding Company Act, 12 U.S.C. Section 1841 et seq. The acquisition, which has triggered the need for a statutory interpretation under the declaratory judgment count, also amounts, they suggest, to a violation of the New Jersey Antitrust Act, and injunctive relief is sought to prevent this acquisition. The acquisition, of course, refers to a merger of two national banks[1]. But Plaintiffs

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[1] Plaintiffs also attempt to characterize this merger as a holding company acquisition for reasons which will become clear infra and presumably in large part because were this characterization correct, the strictures of N.J.S.A. 17:9A-148(b) would not apply.

[2] [sic] In addition to Plaintiff's argument that removal was improper because their complaint sounds in state law, they also contest removal on the grounds that Commissioner Parell did not sign the bank Defendant's petition for removal.

Although a removal petition must ordinarily be signed by all Defendants, Gableman v. Peoria, D & E. Ry. Co., 179 U.S. 335 (1900); In Re General Adjudication of All Rights to Use Water, 531 F. Supp. 449, 455 (D.S.D. 1982), "only indispensible Defendants are required to join in the petition for removal; the consent of nominal or formal parties is not necessary." Ryan v. State Board of Elections of State of Illinois, 661 F. 2nd 1130, 1134 (7th Circuit 1981) quoting First National Bank of Chicago v. Mottola, 302 F. Supp. 785, 790-91 (N.D. Illinois 1969), affirmed, First National Bank of Chicago v. Ettlinger, 465 F. 2d 343, 345 (7th Circuit 1972). "The ultimate test of whether the . . Defendants

understand that at this point in time they have no right to bring a Federal action challenging the proposed merger under the Bank Merger Act, and that that right will not exist until after the Comptroller of the Currency has approved the merger. Plantiffs are now challenging the merger before the Comptroller.

Plaintiffs assert that Defendants' claim that mergers of national banking associations are controlled by Federal law and therefore that Federal jurisdiction exists is asserted only as a defense in pre-emption to this action. Thus, they argue, Federal jurisdiction does not exist and removal was improvidently granted. If a Federal pre-emption defense were all that were before me, I would agree.

The thrust of Plaintiffs' argument is that all the relief they seek is pursuant to New Jersey Statutes, and there is no form of remedy requested which arises under the Constitution or laws of the United States including their request that the proposed merger of two national banks be permanently enjoined. They note in support of this position that the complaint is devoid of any mention of Federal law.[3]

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are . . . indispensible [as opposed to nominal or formal] parties is whether in the absence of [such defendants], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to Plaintiff. Tri-Cities Newspapers, Inc. v. Tri-Cities P.P.&A., Local 349, 427 F.2d 325, 327 (5th Circuit 1970).

Clearly, Commissioner Parell is a nominal, as opposed to an indispensible party. Plaintiffs asked her to make a determination which, by her own reading of state banking law, she can not make. The Commissioner of Banking is not a party in interest in this suit, and her failure to join in the bank Defendants' removal petition does not call for a remand.

[3] It is not necessary for purpose of removal for Plaintiffs to have specified a Federal Statute if the right to relief requires resolution of a substantial question of Federal law, i.e. that Federal law creates the cause of action or that Plaintiff's right to relief necessarily depends

Defendants describe the complaint as an attempt to preempt the lawful regulatory province of the U.S. Government and say that it seeks judicial examination, in State Court, of a proposed merger between two national banks, an issue which will be solely with the purview of the Federal courts but not in advance of a determination of its appropriateness by the Comptroller of the Currency. They reject Plaintiffs' contention that the merger of two national banks is subject to attack under the laws of New Jersey when those laws expressly exempt such mergers from state examination.

Defendants point to the following in support of their position. Title 12, Section 1828(c) of the United States Code (the Bank Merger Act) assigns no role, they argue, to any State Banking official or agency in the review of all bank mergers contemplated by that Act. Section 214(a) of that title provides the conditions under which a national bank may merge with and into a State chartered bank, while Section 214c provides that ". . . [N]o . . . merger [of a national bank into a state bank] shall take place . . . unless under the law of the state in which such national banking association is located State banks may without approval by any State authority . . . merge . . . with national banking associations . . . ." (Emphasis supplied)

Moreover, N.J.S.A. 56:9-5(b)(7) specifically exempts from the New Jersey Antitrust Act "[t]he activities of any . . . national banking institution to the extent that such activities are regulated or supervised by . . . the Federal Government under the banking laws of the United States."

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on resolution of a substantial question of federal law. Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust For So. Calif., 103 S. Ct. 28 VI [sic] at 2851 (1983)[.] Defendants do not find it surprising that the complaint does not allege claims under Federal antitrust or banking laws given the unavailability of Plaintiff's state law claims by comprehensive Federal antitrust and banking law in the area of national bank mergers.

And of critical importance here, N.J.S.A. 17:9A-148 provides, in relevant part:

A, as used in Subsection B. of this section "applicable Federal laws" means the law of the United States . . . governing . . . the merger . . . of a bank organized under State law into a national banking association, under the charter of such association . . .;

B, one or more banks may without the approval of the commissioner or of any other officer, department, board or agency of this State, merge into . . . a national banking association under the charter of each [sic] association . . . [A] merger authorized . . . by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger . . . shall be subject to sections 132 through 147 [Section 17:9A-132 through Section 17:9A-147] or to any other law of this State . . . (Emphasis supplied).

Conversely, section 148 C provides for explicit application of sections 132-147 where the resulting bank is state chartered. Similarly, 12 U.S.C. Section 215a provides for Comptroller approval only when the resulting bank is national: Thus, Defendants argue, there is a clear, concise State and Federal statutory framework for mutually exclusive supervision.

Plaintiffs, they conclude, "seek to overturn a century and a half of Congressionally mandated exclusively Federal regulation of national bank mergers. They seek to impose state standards on a matter which state law holds is solely within the purview of Federal law. They seek judicial repeal of a state statute which, by its terms, specifically rejects their gloss on this transaction, has been repeatedly affirmed by the State Legislature and was found to have continuing vitality by the New Jersey State Attorney General as recently as February 1985. In addition, Plaintiffs assert a claim under the New Jersey Antitrust Act which

is expressly precluded by the terms of that Act." Def. Br. at 11.

Under the Federal Bank Merger Act, 12 U.S.C. Section 1828 et seq., neither state law nor state agencies have any authority to regulate or review either the competitive aspects, "the public interest" or "the convenience and needs of the community to be served" with respect to mergers resulting in national banks. See 12 U.S.C. Section 1828(c)(5). That review is performed by "the Comptroller of the Currency if the . . . resulting bank is to be a national bank." See 12 U.S.C. Section 1828(c)(2)(A). Only the Comptroller has jurisdiction to review the proposed merger under the Federal standards in such cases. See 12 U.S.C. Section 1828(c)(2)(A). Moreover, in any judicial review of the Comptroller's decision only the Federal antitrust standards embodied in the Bank Merger Act may be applied. 12 U.S.C. Section 1828(c)(7)(B) provides:

> In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the grounds that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the Court shall be identical with those that the banking agencies are directed to apply under paragraph (5).
>
> 12 U.S.C. Section 1828(c)(8) provides : For the purposes of this subsection, the term "antitrust laws" means [The Sherman Act, the Clayton Act] . . . and any other acts in pari materia.

These standards displace any other standards or laws, including state laws and thus, the standard embodied in any other laws, if to the contrary, must yield to the standards in the Bank Merger Act. 12 U.S.C. Section 1828(c)(7) and (c)(8).

But there are no applicable standards to the contrary here, in recognition of the fact that, as explicated by the

New Jersey State Legislature in N.J.S.A. 17:9A-148, that mergers into national banks under national bank charters are beyond the power of the state to regulate. See also N.J.S.A. 56:4-5(b)(7). While other activities of nationally chartered banks are subject to State law to the extent that Congress has so specified or to the extent that there is no inconsistency with or infringement of Federal law, it is the act of merger which is the thrust of this case, and as to that, the state has no role.[4]

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[4] Plaintiffs' attempt to bring this action within the purview of the Bank Holding Company Act, 12 U.S.C. at Section 1842, is unavailing. That statute provides, in pertinent part:

(a) It shall be unlawful except with the prior approval of the Board [of Governors of the Federal Reserve System] to be taken that causes any company to become a bank holding company; two, for any action to be taken that causes a bank to become a subsidiary of a bank holding company; three, for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than five per centum of the voting shares of such bank; four, for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or, five, for any bank holding company to merge or consolidate with any other bank holding company. 12 U.S.C. Section 1842 (emphasis supplied).

Despite plaintiffs' characterization, the proposed transaction they challenge does not fit within any of the above-described categories. Clearly, subsections (1) and (2) of the Act do not, by their terms, apply to this merger, which will result in neither the creation of a bank holding company nor the creation of a new subsidiary of a bank holding company. As to subsection (3), First Fidelity Bancorporation, of which FFBSJ is a subsidiary, will acquire no stock whatsoever as a result of this merger. Further, subsection (4) explicitly exempts bank mergers, and subsection (5), which describes the merger of two bank holding companies, is clearly inapposite.

While Plaintiffs rely on the Third Circuit's decision in Girard Bank v. Board of Governors of Federal Reserve, 748 F.2d 838, 841, (3rd Circuit 1984) for the proposition that the Bank Holding Company Act applies to this proposed merger, that case is inapplicable here. While Girard involved a transaction in which a bank holding company acquired control over the voting shares of a bank—a transaction to which sub-

One of the few things on which the parties agree in the veritable mountain of paper filed on this motion is that the determination as to whether the case arises under the laws of the U.S. must be made on the face of the complaint without regard to defenses that may be raised.

Despite the parties' characterization, the instant case does not present a classic pre-emption issue and it is crystal clear from the face of the complaint that the Federal question at issue herein is not merely the spectre of a pre-emption defense "lurking in the background," Gully v. First National Bank in Meridian, 289 U.S. 109, 117 (1936), which would be insufficient to warrant removal. Franchise Tax Board, supra; Long Island R.R. Co. v. United Transportation Union, 484 F. Supp. 1290 (S.D.N.Y. 1980). Rather, this is a situation in which the Plaintiffs' claim is "exclusively governed by Federal law, so that the [Plaintiffs] necessarily [are] stating a Federal cause of action," although they have couched it in terms of State law asserted against the merger of national banks. Despite Plaintiffs' references to state law, it is the merger of two

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section (3) would apply—the instant case does not. Defense counsel has represented that the proposed merger at issue herein will involve "no acquisition of any bank stock by [First Fidelity] Bancorporation," Defendant's Reply Memorandum at 3, and has indicated in open court that the holding company will not even accept delivery of any bank stock certificates. Accordingly, the fact that subsection (3) does not expressly exempt bank mergers is of no moment. Stated simply, the Bank Holding Company Act does not apply to this merger of two national banking associations, which is explicitly exempt from coverage by subsection (4), the only subsection which might arguably apply.

In Vial v. First Commerce Corp., 564 F. Supp. 650 (E.D. Louisiana 1983), the Court held that "[t]he words in the statute 'other than a bank' clearly show the intention of Congress not to require a bank acquiring the assets of another bank to obtain Board approval." Id. at 658, quoting Leuthold v. Camp, 273 F. Supp. 695, 702, (D. Montana 1967), affirmed, 405 F. 2d 499 (9th Circuit 1969). This Court agrees with the interpretation of Section 1842 adopted in Vial. The merger at issue herein is beyond the reach of the Bank Holding Company Act.

national banking associations that Plaintiffs seek to block, and seek it on the face of their complaint. See, e.g., Comp. 9 Para. F). 14A Wright & Miller, Federal Practice and Procedure Section 3722 at 273 (and cases cited therein.) See also Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n. 2 (1981) (approving the lower courts' finding that removal was proper where Plaintiff's purportedly state law claims were in fact artfully pled Federal claims which were previously litigated).

Thus, this is not a case in which the Court must determine whether Federal law has pre-empted the field, but one in which the state law which plaintiffs invoke expressly indicates that Federal law controls the question they raise. In this scenario, it is incumbent upon this Court to assert jurisdiction.

Nevertheless, this Court can offer these Plaintiffs no relief at this juncture. As Plaintiffs themselves readily admit, they cannot state a claim under Federal law until such time as the Comptroller of the Currency acts on the merger proposal. Although Plaintiffs made that observation as a corollary to their assertion that there is state jurisdiction to entertain their claims, the cause of action they characterize as a state law concern is, as set forth hereinbefore, clearly one for this Court. Hence, they do not make out a state law claim, and their Federal claims are premature.

The Third Circuit's decision in Trent Realty v. First Federal Savings & Loan Association, 657 F. 2nd 29, 35 (3rd Circuit 1981), is not to the contrary. That case merely reaffirmed the well-settled principle that the existence of Federal pre-emption as a defense was not a sufficient ground for removal. See also Home Federal Savings & Loan Association v. Insurance Department of Iowa, 571 F. 2d 423 (8th Circuit 1978); Washington v. American League of Professional Baseball Clubs, 460 F. 2nd 654 (9th Circuit 1972). In a footnote, the Court in Trent Realty

expressly distinguished Federated Department Stores v. Moitie, supra, suggesting that Moitie did not involve a pre-emption issue, but one in which "the Court refused to permit the Plaintiffs to avoid Federal removal jurisdiction by 'artfully' casting their 'essentially Federal law claims' as State law claims." Trent Realty, supra at 35, n.2., quoting Moitie, supra. The Trent Realty court noted that the reference to "pre-emption" in Justice Brennan's dissent in Moitie actually referred to a situation where, as here, "The complaint, 'though ostensibly grounded solely on state law, is actually grounded on a claim in which Federal law is the exclusive authority.' " Id.

The instant case only involves "pre-emption" in the sense in which Justice Brennan used that term in his dissent in Moitie. Rather than a situation in which Federal banking and antitrust law have completely pre-empted the field, this case involves a coordinated statutory structure in which the State Statute acknowledges and defers to Federal regulation of national bank mergers.

This reading of the law at issue in this case comports with that expressed by the New Jersey Commissioner of Banking in response to the Plaintiffs' request that she disapprove the pending merger of Defendant banks. As Commissioner Parell made clear, she lacks jurisdiction to act in this matter, which is purely one of Federal concern. See letter of Commissioner Parell to William S. Greenberg, dated July 1, 1985, attached to Metzger Affidavit. As no Federal judicial review of the proposed merger can be conducted at this time, and this Court will not entertain any pendant State claims, the complaint must be dismissed.

The parties to this action have also cross-moved for the imposition of sanctions—specifically, attorneys' fees, expenses, and costs. Defendants contend that this Court may impose such sanctions under Rule 11 and 28 U.S.C. Section 1927, and pursuant to its inherent power to punish the

willful abuse of judicial process. Plaintiffs argue that it is Defendants who should suffer these sanctions for their "baseless" removal of this action. For the reasons set forth below, no sanctions will be imposed on either party.

As the Notes of the Advisory Committee on the 1983 Amendment to this Rule 11 states:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See Kinee v. Abraham Lincoln Federal Savings & Loan Association, 375 F. Supp. 975 (E.D. Pennsylvania 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See Nemoroff v. Abelson, 620 F. 2nd 339 (2d Circuit 1980).
>
> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The Court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Advisory Committee Note, Amendments to Rules, 97 F.R.D. 165, 198-199.

Thus, to comply with Rule 11, an attorney must take care to determine, prior to filing, that there is a sound basis in fact and law for the pleadings he generates. Goldman v. Belden, 580 F. Supp. 1373, 1381 (W.D.N.Y. 1984), vacated on other grounds, 754 F. 2nd 1059 (2d Circuit 1985). Failure to do so may result in the imposition of sanctions for filing frivolous papers. Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699, 700 (S.D.N.Y. 1983).

Under section 1927, sanctions will be imposed upon an attorney personally only upon a showing of willful bad faith. Baker Industries v. Cerberum Limited, 764 F. 2nd 204, 208 (3rd Circuit 1984); United States v. Blodgett, 709 F. 2nd 608, 610 (9th Circuit 1983); United States v. Ross, 535 F. 2d 346, 350 (6th Circuit 1976). Where such egregious conduct is found, the decision of whether to impose sanctions is committed to the sound discretion of the District Court. Baker Industries, supra at 210; Mobil Oil Corp. v. Indep. Oil Workers Union, 679 Fed. 2d 299, 305 (3d Circuit 1982)[.]

As this Court has determined that the case was properly removed here, Plaintiffs' "baseless removal" claim must be rejected out of hand.

As to Defendants' motion, this Court simply does not find lack of reasonableness much less intentional misconduct on the part of the Plaintiffs or their attorneys. They have chosen the wrong forum—State Court —to litigate the ultimate issue in this case. Also, they have asked that court to make a determination which is in fact irrelevant to the merger they challenge in this action. Nevertheless, particularly given the somewhat involved Federal/State statutory scheme in the banking field, the imposition of sanctions would be inappropriate in this case. Accordingly, both parties' motions to impose sanctions will be denied.

The Court will enter an order referencing this opinion.

Supreme Court, U.S.
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No. 85-1700

In The

Supreme Court of the United States

October Term, 1985

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FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,

Petitioners,

v.

MARY LITTLE PARELL, Commissioner of Banking of the State of New Jersey, et al.,

Respondents.

—o—

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

—o—

BRIEF IN OPPOSITION

—o—

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether a defense of federal preemption to a state court action seeking an interpretation of New Jersey's Bank Holding Company Act is sufficient to vest jurisdiction over the matter in the federal district court, in light of the authority granted to states in the Federal Bank Holding Company Act to regulate the activities of bank holding companies?

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BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bank Holding Company Act of 1956, 12 U.S.C. § 1846.

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

N.J.S.A. § *17:9A-345(a) (1985)* amended by New Jersey *L.* 1986, *c.* 4).

> Except as otherwise provided by sections 3 and 4 of this act, (a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next proceeding such acquisition.

N.J.S.A. § *17:9A-347 (1985)* (repealed by New Jersey *L.* 1986, *c.* 4).

> Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 of this act, if such acquisition results from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

COUNTERSTATEMENT OF THE CASE

This matter is before the Court on the petition of First Fidelity Bancorporation and First Fidelity Bank, National Association, South Jersey, for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment entered by that court on February 14, 1986.

The matter regards a complaint filed May 14, 1985 in the Superior Court of New Jersey, Chancery Division, by

a group of New Jersey bank holding companies and their affiliated banks (hereafter "UJB"). The complaint concerned alleged violations of the New Jersey Bank Holding Company Act, *N.J.S.A.* 17:9A-344 *et seq.* (the "BHCA") as well as the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.*

The transaction which was the subject matter of the complaint was the then proposed acquisition by First Fidelity Bancorporation ("First Fidelity"), a New Jersey bank holding company, of the National Bank and Trust of Gloucester County ("Gloucester Bank"), a national banking association, by a merger with and into First Fidelity Bank, N.A., South Jersey ("FFBSJ"), one of First Fidelity's national bank subsidiaries. The transaction was structured as a merger between the two nationally chartered banks and approval was therefore sought for the transaction from the United States Comptroller of the Currency pursuant to his authority in the Bank Merger Act of 1966, 12 *U.S.C.* § 1828(c) (the "Bank Merger Act").

UJB entered objections to the application before the Comptroller. In addition, UJB petitioned the New Jersey Banking Commissioner, Parell, to conduct a hearing to determine whether or not First Fidelity's acquisition of Gloucester Bank would be in the public interest and, if she found that it was not, to take appropriate measures to prevent it. UJB also filed a complaint in the New Jersey Superior Court, Chancery Division, in which it sought to have the acquisition enjoined as being violative of state law.

The essence of UJB's complaint was that the acquisition of Gloucester Bank by First Fidelity, even if accom-

plished by a merger between two national banks, would violate both the New Jersey BHCA, *N.J.S.A.* 17:9A-344 *et seq.*, and the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.* While UJB apparently conceded that the merger transaction itself (involving FFBSJ and Gloucester Bank) was a matter solely for review by the Comptroller, it argued that the resulting acquisition of Gloucester Bank by First Fidelity must additionally have satisfied the demands of New Jersey law governing bank holding company acquisitions, particularly, that it not result in the holding company controlling banks which collectively own more than 20% of statewide commercial bank deposits. *See N.J.S.A.* 17:9A-345(a).* The complaint stated that, following consummation of the subject merger, First Fidelity's bank holdings would exceed this "20% limitation."

The complaint cited another section of the BHCA which contained an express exemption from the "20% limitation" for "acquisition[s of bank stock] result[ing] from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks." *N.J.S.A.* 17:9A-347.** UJB, while acknowledging both the exemption's existence and its applicability to the transaction, sought to avoid its effect by urging the state court to declare it to have been repealed by implication.

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* *N.J.S.A.* 17:9A-345(a) was amended by New Jersey *L.* 1986, c. 4, § 3 on March 28, 1986. References in this brief to *N.J.S.A.* 17:9A-345(a) refer to that section as it existed immediately prior to that amendment and at the time UJB's complaint was filed.

** *N.J.S.A.* 17:9A-347 was repealed by New Jersey *L.* 1986, c. 4, § 10 on March 28, 1986. References in this brief to *N.J.S.A.* 17:9A-347 refer to that section as it existed immediately prior to that amendment and at the time UJB's complaint was filed.

On June 3, 1985, the bank defendants* removed the action to federal court and moved to dismiss for failure to state a cause of action. In support of the removal, they asserted that the complaint, which sought to block a merger between two national banks, raised questions only of federal rather than state law. The fact that by virtue of the bank merger First Fidelity, the holding company, would be acquiring Gloucester Bank was not seen by the bank defendants as raising a cognizable state law issue. UJB cross moved to remand the matter to state court. Defendant Parell, agreeing with UJB that the matter should not have been removed to federal court, joined in its motion to remand. Believing also, however, that UJB's complaint lacked merit, Parell joined with the bank defendants, to that extent only, in urging dismissal.

Following oral argument on the motion, Judge Barry, on July 31, 1985, rendered an oral opinion in which she denied UJB's motion to remand and granted the bank defendants' motion to dismiss. She did so based on her characterization of the transaction solely as a merger between two national banks. However, state banking law grants to the New Jersey Banking Commissioner no authority to review or approve bank mergers in which the resulting bank is a national bank and, in fact, expressly defers to the Comptroller all jurisdiction to review or approve a proposed merger of a state bank into a national bank. *See N.J.S.A.* 17:9A-148B. Judge Barry therefore concluded that this was not a case concerning a defense of

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* First Fidelity, FFBSJ and Gloucester Bank will be collectively referred to hereafter as the "bank defendants."

federal preemption, insufficient to warrant removal, but a situation in which the plaintiff's claim was exclusively governed by federal law so that the plaintiff was necessarily stating a federal cause of action. Therefore, federal jurisdiction existed and removal had been proper. Furthermore, since the Comptroller had not at that time approved the merger, a challenge to the merger on federal antitrust grounds was premature. Dismissal was ordered.

A notice of appeal was filed by UJB on August 1, 1985. While the appeal was pending, on August 29, 1985 the Comptroller approved the merger. On September 28, 1985, following passage of the 30-day waiting period prescribed by the Bank Merger Act, the merger was consummated.

The appeal was argued on November 18, 1985. On February 14, 1986 the Court of Appeals for the Third Circuit reversed the decision of the district court and ordered the case remanded to the New Jersey Superior Court. *United Jersey Banks v. Parell*, 783 *F.*2d 360 (3d Cir. 1986). In her opinion, Judge Sloviter set forth the determination of the court that a transaction such as the one in issue could have attributes of both a merger and an acquisition, that based on a prior decision of the third circuit a New Jersey court could find that the essence of the transaction is an acquisition,* and that federal law does not completely displace state law in the area of bank holding company acquisitions. To the contrary, since federal law specifically preserves state law with respect to the regulation of

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* *See Girard Bank v. Board of Governors of Federal Reserve*, 748 *F.*2d 838 (3rd Cir. 1984).

bank holding companies, the New Jersey BHCA could apply to the transaction. 783 *F.*2d at 369. The court concluded that the cause of action does not require resolution of a substantial question of federal law in dispute between the parties, and, in fact, "the cause of action alleged patently is derived from state law." 783 *F.*2d at 367.

Rehearing and Rehearing En Banc were denied on March 11, 1986. On March 28, 1986, the passage of New Jersey *L.* 1986, *c.* 4 amended the BHCA to effectively raise the percentage limitation on the aggregate average deposits which may be controlled by a holding company in New Jersey.* The limit is to be increased twice over a three and one-half year period. The amended BHCA contains a sunset provision which may possibly affect the complete elimination of limitations on deposits after that time. Moreover, the amended BHCA repeals *N.J.S.A.* 17:9A-347, which had contained the challenged exception to the 20% limitation on statewide deposits for institutions which were acquired by merger. Finally, it amended *N.J.S.A.* 17:9A-345(a) to leave no room for doubt that a holding company may not control deposits which it acquires as the result of a merger subject to approval by the

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* New Jersey *L.* 1986, *c.* 4 amends *N.J.S.A.* 17:9A-345 to provide that a holding company may control 12% of the aggregate average deposits in all depository institutions for the first year following enactment of the act, 13% for the second year following enactment and 13.5% for the third year and the first half of the fourth year following the effective date. However, while previously only commercial bank deposits were included in the base for calculating the limitation, the amendment provides for the inclusion of both commercial bank and thrift institution deposits in the base, effectively allowing a company to control a larger amount of deposits under the amended "20% limitation" than it could before the amendment.

Comptroller, if those deposits are in excess of the percentage limitation in effect at the time.

On April 17, 1986, the bank defendants filed the within petition for a writ of certiorari, a copy of which was received by respondent Parell on April 23, 1986.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTRIOARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CAUSE OF ACTION ALLEGED PATENTLY IS DERIVED FROM STATE LAW AND A DEFENSE OF FEDERAL PREEMPTION IS INSUFFICIENT TO SUPPORT REMOVAL TO FEDERAL COURT.

The court of appeals found that "the cause of action alleged (in UJB's complaint) patently is derived from state law." 783 *F.*2d at 367. Using the principles expressed by this Court in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 *U.S.* 1 (1983), the court concluded that federal jurisdiction does not exist and the case should be remanded to state court. The general rule expressed in *Franchise Tax Board* regarding removal of cases to federal court based on federal preemption of state law is that a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case arises under federal law. 463 *U.S.* at 10. The claim presented in UJB's complaint is that the transaction at issue, the acquisition of Gloucester

Bank by First Fidelity, is prohibited by the New Jersey BHCA. To prove its case, UJB is obliged to convince the court that its interpretation of the New Jersey BHCA is correct. Therefore, the action belongs in state court.

The essence of petitioners' argument is that UJB failed to plead a "necessary" federal question in its complaint and therefore its cause of action arises under federal law. *See Franchise Tax Board,* 463 *U.S.* at 22. Petitioners suggest that the preemptive force of the national banking statutes is so powerful as to completely preempt any state cause of action for violation of state statutes relating to bank holding companies.

It is clear that this is not a situation in which all state law is preempted by federal law so that the "real nature" of the case is federal. To the contrary, regulation of banking has been subject to the dual control of state and federal governments since the passage of the first National Bank Act in 1863. *National State Bank, Elizabeth, N.J. v. Long,* 630 *F.*2d 981, 985 (3rd Cir. 1980). National banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. *Anderson National Bank v. Luckett,* 321 *U.S.* 233 (1944).

One of the regulatory areas in which Congress has specifically permitted state laws to constrain the activities of national banks concerns the geographical expansion of banks. Congress has, in effect, delegated to the states the authority to determine by law (although it is the task of the federal regulator to apply such laws) whether and to what extent national banks are permitted to branch or to retain branches following a bank merger. *See* 12 *U.S.C.*

§ 36(c) (the "McFadden Act"). National banks are subject to the branching limitations imposed by state law, a policy designed to maintain "competitive equality."

Historically, a bank might attempt to avoid such state-law branching restrictions by organizing a holding company to charter new banks in towns or districts into which the bank was forbidden to branch. *Whitney National Bank v. Bank of New Orleans,* 379 *U.S.* 411 (1965). This resulted in the adoption by many states of bank holding company laws the purpose of which is essentially to carry over into the field of bank holding companies the same state-law restrictions upon expansion that apply to their bank subsidiaries; *i.e.,* if a bank is not permitted to branch under state law, a typical state-bank holding company law would prohibit ownership or acquisition of another bank by the holding company under similar circumstances. (New Jersey's BHCA is such a law). These laws apply to holding companies owning both state and national bank subsidiaries.

The Federal Bank Holding Company Act of 1956, 12 *U.S.C.* § 1841 *et seq.* (the "Federal Bank Holding Company Act"), preserves these state laws regulating bank holding companies. It provides:

> The enactment by the Congress of (the Federal Bank Holding Company Act) shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 *U.S.C.* § 1846.]

The Act expressly permits states to exercise jurisdiction and control over the activities of bank holding companies and their subsidiaries, even subsidiaries which are national

banks. *Commercial National Bank of Little Rock v. Board of Governors,* 451 *F.*2d 86 (8th Cir. 1971); *Security National Bank, Etc. v. First West Virginia Bancorporation,* 277 *S.E.*2d 613 (W. Va. 1981). Rather than preempting state restrictions upon bank holding company expansion, as the bank defendants suggest, federal antitrust laws operate only withir the context of and in tandem with those state restrictions. *See U.S. v. Marine Bancorporation,* 418 *U.S.* 602, 627-630 (1974); *U.S. v. Citizens National Bank,* 422 *U.S.* 86, 118-119 (1975). Since the Federal Bank Holding Company Act permits states to exercise such jurisdiction over the activities of bank holding companies, even to prohibit altogether their formation, it follows that less restrictive prohibitions like the 20% limitation contained in the New Jersey BHCA are also permitted. *See Commercial National Bank of Little Rock,* 451 *F.*2d at 89.

The court of appeals correctly applied the above principles to the transaction at issue in this case. The court relied on *Girard Bank v. Board of Governors of the Federal Reserve System,* 748 *F.*2d 838 (3rd Cir. 1984) for the proposition that a transaction may have attributes of both a merger between two banks and an acquisition of a bank by a bank holding company and thereby be subject to review by more than one agency. The court recognized that while the transaction at issue is a merger of two national banks under the Bank Merger Act which only the Comptroller has jurisdiction to review, it may also be regarded as an acquisition of a bank by a bank holding company and subject to New Jersey statutes regulating acquisition of banks by bank holding companies. Since section 1846 of the Federal Bank Holding Company Act

reserves to the states the *general* authority to "(exercise) such powers and jurisdiction . . . with respect to banks, bank holding companies, and subsidiaries thereof," and since it is the *state* which chooses to exercise this power specifically with respect to acquisitions of bank stock, the question of what constitutes such an acquisition clearly must be decided with reference to state law.

Petitioners imply that the court of appeals relinquished jurisdiction rightfully vested in the federal court by leaving it to the state court to determine whether or not the transaction at issue is actually an acquisition. In light of the role of state law in regulating bank holding companies, and the recognition by the court of appeals that the transaction at issue may be characterized as an acquisition by a bank holding company, it is clear that the court was correct in finding that the state law upon which the complaint is based is not displaced by federal law and that therefore the state claim pleaded was not "really one" of federal law. 783 *F.*2d at 369.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The rules of this Court governing review on writ of certiorari make plain that review will be granted only "when there are special and important reasons therefor." *Sup. Ct. R.* 17.1. In an attempt to exaggerate the importance of its case, the petitioners assert that the decision of the court of appeals conflicts with the decisions

of three other circuits and the express language of the Bank Merger Act. The conflict allegedly arises because the court of appeals disregarded the established federal antitrust standards which, petitioners say, are the exclusive standards against which to test all mergers or acquisitions of banks and upon which all limitations of those transactions must be based. The conclusion which petitioners draw is that since the federal standards are exclusive, the New Jersey BHCA which contains different standards is so displaced by federal law that UJB's claim, based on the New Jersey BHCA, is inherently a federal claim.

However, the three circuit court cases which allegedly conflict with the court of appeals decision are readily distinguishable. Those cases concern the ability of the *federal regulators, e.g.* the Federal Reserve Board and the Comptroller, to test mergers or bank holding company acquisitions against competitive standards which are more stringent than the antitrust standards incorporated into the Federal Bank Holding Company Act and Bank Merger Act. The cases hold that the federal agencies lack discretion to disapprove a transaction without finding a violation of the antitrust standards explicitly incorporated into their statute. *See,* for example, *Mercantile Texas Corp. v. Board of Governors, etc.,* 638 *F.*2d 1255, 1263 (5th Cir. 1981). They simply do not concern the ability of a *state* to legislate additional limitations upon acquisitions by bank holding companies. As discussed above, that ability of states to create such limitations is specifically authorized by the Federal Bank Holding Company Act. *See* 12 *U.S.C.* § 1846.

Likewise, petitioners completely misunderstood the intent and effect of the inclusion of the antitrust standards

in the Bank Merger Act and the Federal Bank Holding Company Act. Again, these statutes provide only that the *Comptroller* or the *Federal Reserve Board* shall not approve a merger or acquisition which would result in a violation of the antitrust standards set forth therein. *See* 12 *U.S.C.* § 1842(c) and 12 *U.S.C.* § 1828(c)(5). Moreover, a court must utilize those uniform federal antitrust standards in any judicial proceeding in which the approval of a merger or acquisition *by those federal agencies* is being reviewed. *See* 12 *U.S.C.* § 1828(c)(7)(B).

Consequently, the allegedly conflicting cases do not address the situation raised by this case and there is no split in the circuits as petitioners urge.

Petitioners have not even attempted to demonstrate any special and important reasons to justify further review on writ of certiorari other than their claim that the decision of the court of appeals was incorrect. To the contrary, because of the peculiar interrelationship of federal and state banking law, the case is unlikely to have application to the question of removal jurisdiction beyond its own unique factual circumstances. Furthermore, the basis for the controversy underlying the original complaint has been substantially eliminated. Upon the consummation of the merger of Gloucester Bank into FFBSJ on September 28, 1985, the transaction sought to be enjoined by UJB's complaint was accomplished. In addition, as a result of the amendment of the New Jersey BHCA, effective March 28, 1986, while a New Jersey court could conclude that the merger had violated the provisions of the BHCA in effect at the time of the merger, that transaction would not violate state law as it exists today. Indeed,

as to all future transactions, the need to resolve the state law issue, whether *N.J.S.A.* 17:9A-347 (the merger exception to the 20% limitation) was repealed by implication, was obviated by the actual repeal of that section!

In conclusion, the decision sought to be reviewed does not present a special or important reason to justify review by this Court on writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 85-1700

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,
Petitioners,

vs.

MARY LITTLE PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY; UNITED JERSEY BANKS; UNITED JERSEY BANK/SOUTHWEST; CONSTELLATION BANCORP; THE NATIONAL STATE BANK; HORIZON BANCORP; PRINCETON BANK; NEW JERSEY NATIONAL CORPORATION; NEW JERSEY NATIONAL BANK; UNITED COUNTIES BANCORPORATION; AND UNITED COUNTIES TRUST COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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20 pp

QUESTIONS PRESENTED

1. Is an action seeking declaratory judgment as to the interpretation of a state statute rendered moot by subsequent amendment of the legislation eliminating the provision to be interpreted?

2. May federal jurisdiction be provided by assertion of a defense of preemption of state law where the federal statutes relied upon provide no remedy for the specific harm alleged?

RULE 28.1 STATEMENT

Names of Reporting Parties:

United Jersey Banks;
United Jersey Bank/ Southwest;
Constellation Bancorp;
The National State Bank;
Horizon Bancorp;
Princeton Bank
New Jersey National Corporation;
New Jersey National Bank;
United Counties Bancorporation;
United Counties Trust Company.

United Jersey Bank/Southwest is a wholly owned subsidiary of United Jersey Banks except for director qualifying shares.

Princeton Bank is a wholly owned subsidiary of Horizon Bancorp except for director qualifying shares.

New Jersey National Bank is a wholly owned subsidiary of New Jersey National Corporation except for director qualifying shares.

United Counties Trust Company is a wholly owned subsidiary of United Counties Bancorporation except for director qualifying shares.

United Jersey Banks has the following subsidiaries which are not wholly owned:
United Jersey Bank/Franklin State
United Jersey Bank/Hillsborough National

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant to this proceeding and not cited in the petition for certiorari are the following:

THE BANK HOLDING COMPANY ACT of 1956, as amended, 12 *U.S.C.* § 1846.

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

NEW JERSEY STAT. § 17:9A-345(a) (prior to March 28, 1986)

Except as otherwise provided by sections 3 and 4 of this act,[1]

(a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next proceeding such acquisition;

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[1] § 17:9A-346, 17:9A-347.

NEW JERSEY STAT. § 17:9A-347 (prior to March 28, 1986)

Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 of this act,[1] if such acquisition results from exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

[1] § 17:9A-345.

NEW JERSEY STAT. §17:9A-345(a) (effective March 28, 1986)

No company or person which owns more than 25% of the stock of any bank located in this State or savings bank located in this State shall acquire ownership of more than 10% of the stock of another bank located in this State or savings bank located in this State or assume the deposit liabilities of another bank located in this State or savings bank located in this State in a manner which requires the approval of a federal regulatory authority pursuant to subsection (c) of § 18 of the "Federal Deposit Insurance Act," 64 Stat. 891 (12 *U.S.C.* 1828 (c)), or subsection (d) (11) and subsection (o)(2)(o) of § 5 of the "Home Owner's Loan Act of 1933," 48 Stat. 132 (12 *U.S.C.* 1464 (d)) if, at the time of the transaction, or if, as a result of that transaction, the company or person owns, or would own, more than 10% of the stock of one or more banks located in this State or savings banks located in this State, whose aggregate average deposits exceed 12% for the first year following enactment of this 1986 amendatory and supplementary act, 13% for the second year following enactment of this 1986 amendatory and supplementary act, and 13.5%

for the third year and for the first one half of the fourth year following enactment of this 1986 amendatory and supplementary act of the aggregate average deposits of all depository institutions as of the two call dates for which published figures are available next preceding that transaction;

STATEMENT OF THE CASE

This matter concerns an action brought by various New Jersey bank holding companies and certain subsidiary banks (the bank respondents) seeking a declaration from the courts of New Jersey as to the true meaning of a New Jersey statute setting a limitation on acquisitions by bank holding companies. The sections as to which declaratory judgment was sought have, subsequent to the Third Circuit opinion in this case, been significantly amended so as to render this matter moot.

At the time this action was instituted, a New Jersey statute, *N.J.S.A.* 17:9A-345(a), provided that no holding company could increase its holdings to include banks with more than 20% of commercial banking deposits throughout the State of New Jersey by means of an acquisition of another, previously unowned bank. However, that limitation was expressly made subject to an exception for acquisitions by merger. The bank respondents, believing that the merger exception was an inadvertent relic of a prior statutory scheme from a time when statewide bank holding companies in New Jersey were forbidden, sought a declaration in the Superior Court of New Jersey that the merger exception must be deemed repealed by implication in that its existence made the 20% deposit cap meaningless.

The event which triggered the filing of the Superior Court complaint was the proposed merger between First Fidelity Bank, National Association, South Jersey (FFBSJ) and National Bank and Trust Company of Gloucester County (hereafter Gloucester County), both of them national banking associations. FFBSJ is a wholly owned subsidiary of First Fidelity Bancorporation (hereafter First Fidelity) which, with the acquisition of Gloucester County, would have owned banks in New Jersey which together had more than 20% of commercial bank deposits thereby violating the cap set in *N.J.S.A.* 17:9A-345(a). Because the acquisition was by merger, if the exception to the cap was viable, then First Fidelity would not be in violation of the law. The bank respondents believed, and continue to believe, that it was never the legislative intent to have an exception swallowing the rule and therefore sought the declaratory judgment that the merger exception was repealed.

A second cause of action alleged that the acquisition of Gloucester County would result in a violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 et seq.

The proposed merger between FFBSJ and Gloucester County was submitted to the United States Comptroller of the Currency pursuant to the Bank Merger Act, 12 *U.S.C.* § 1828(c). It has never been contended that it was anything but the appropriate route to follow for required federal approval of the merger in that two national banking associations were involved. The bank respondents have taken the position throughout this case that whatever ruling was handed down by the Comptroller, because the surviving bank, FFBSJ, was a wholly owned subsidiary of a bank holding company, First Fidelity, this was a transac-

tion also subject to the New Jersey 20% limitation on bank holding companies. While this matter was pending in the Third Circuit, the Comptroller approved the merger which was then effectuated after the statutory thirty day waiting period. At that point, First Fidelity apprised the Third Circuit of this fact and raised the claim that the case was moot because of the Comptroller's approval, which argument was resisted by the bank respondents. Because the Third Circuit ultimately concluded that jurisdiction never existed in the federal courts, it declined to reach the mootness claim raised by First Fidelity. (783 F.2d at 370, n.12.)

The arguments presented by First Fidelity below were essentially the same as those advanced now in the petition for certiorari. Because the merger was subject to the Comptroller's review, First Fidelity asserted that this whole action is really one under the Bank Merger Act even though that statute itself provides that no action could be brought in Federal District Court until after the Comptroller has issued a ruling on the merger application. 12 *U.S.C.* § 1828(c)(7)(A). The argument was made that the standards to be utilized by the Comptroller as set forth in that statute displace any other standard of review that could be applied to such a merger. The Third Circuit found no merit to that assertion, finding that at most First Fidelity was asserting federal preemption which, as a defense, is not a basis for federal jurisdiction. 783 *F.* 2d at 368. As a result, the Third Circuit ordered a remand to the Superior Court of New Jersey. An application for rehearing or rehearing *en banc* was denied (21a) but issuance of

the judgment in lieu of mandate was stayed to allow time for the filing of a petition for certiorari (22a).

Subsequent to the Third Circuit opinion in this matter, there was signed into law by New Jersey Governor Kean a bill amending the New Jersey banking legislation which is the subject matter of this litigation. The deposit cap appearing in *N.J.S.A.* 17:9A-345 has been changed so that it now deals with a universe including not only commercial banks but also thrift institutions (savings banks and savings and loans) so that there is no question that First Fidelity's holdings, even including Gloucester County, are within the current statutory limitation. Moreover, the previously existing exception for acquisitions by merger, *N.J.S.A.* 17:9A-347, which was key to the controversy causing the complaint to be filed, has been repealed.

SUMMARY OF THE ARGUMENT

At this point in time, the bank respondents contend that the litigation has been rendered moot by the amendments to the New Jersey legislation occurring after the Third Circuit opinion. The provisions as to which declaratory judgment was initially sought in New Jersey Superior Court have been altered so that there is in fact no live controversy remaining. In particular, the provision as to which a declaration was sought that there had been repeal by implication, has now been expressly repealed by the legislature.

If this Court were to conclude that the matter is not moot, then it is the bank respondents' contention that the Third Circuit correctly decided that there was no federal jurisdiction based upon the clear precedent of this Court's decision in *Franchise Tax Board of the State of California vs. Construction Laborers*

Vacation Trust for Southern California, 463 *U.S.* 1,103 *S. Ct.* 2841, 77 *L. Ed.* 2d 420 (1983). The federal legislation relied upon by First Fidelity, even if its arguments are accepted, would do no more than prevent the State of New Jersey, and other states with similar deposit cap limitations on holding company acquisitions, from enforcing those limitations by virtue of their being preempted by federal standards for bank mergers. Preemption as a defense is not a basis of federal jurisdiction sustaining removal of a state court action presenting solely state claims. The one recognized exception to this doctrine under the decision in *Avco Corp. vs. Aero Lodge 735,* 390 *U. S.* 557,88 *S. Ct.* 1235, 20 *L. Ed.* 2d 126 (1968) requires that some substitute federal cause of action be provided. There is no federal cause of action under which a party could seek to enforce a state limitation on deposits, so *Avco* is inapplicable.

POINT ONE

THE AMENDMENT OF THE NEW JERSEY STATUTORY PROVISIONS AS TO WHICH DECLARATORY JUDGMENT WAS SOUGHT RENDERS THIS CASE MOOT.

This lawsuit was filed to seek adjudication from New Jersey courts as to the proper interpretation of a particular state statute. That statute has now been amended, substantially changing the provisions at issue so that there is no longer any point to interpreting the old law.

At the time this suit was instituted, New Jersey had a 20% deposit cap for commercial banking as a limit beyond which holding companies could not go through acquisition as opposed to internal growth. There was also a stated exception for acquisition by

merger. Now the statute has been amended so that the limitation has been changed to one on deposits of not only commercial banks but also so-called thrift institutions, which include savings banks and savings and loan associations. Furthermore, the merger exception has been repealed. There is no question but that the acquisition of Gloucester County through merger with FFBSJ, which was the triggering event for the lawsuit, does not put First Fidelity over the new limit established by the New Jersey legislature. Therefore, any attempt to determine the meaning of the former New Jersey provision would be a meaningless exercise.

The law is well settled that a case is moot " 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *United State Parole Commission vs. Geraghty,* 445 *U.S.* 388, 396, 100 *S. Ct.* 1202, 1208, 63 L. Ed. 2d 479 (1980), quoting *Powell v. McCormack,* 395 *U.S.* 486, 496, 89 *S. Ct.* 1944, 1951, 23 *L. Ed.* 2d 491 (1969).

Decisions involving interpretation of legislation leave no doubt that this case is indeed moot. For example, various circuits all considered a statutory formula for distribution of highway funds. *Vermont vs. Goldschmidt,* 638 *F.* 2d 482 (2d Cir. 1980); *New Mexico vs. Goldschmidt,* 629 *F.* 2d 665 (10th Cir. 1980); *Arkansas vs. Goldschmidt,* 627 *F.* 2d 839 (8th Cir. 1980). During the course of these lawsuits in which the respective states were seeking enforcement of an existing formula, Congress passed new legislation controlling the obligation of funds not already committed before the new statute's effective date. All three circuits concluded that the new statute rendered

moot claims for money allegedly due pursuant to the previous law. Because the new law was a complete substitution for what existed at the time of the district court decision, the controversy was moot. *Arkansas vs. Goldschmidt,* 627 *F.* 2d at 842.

In *Defenders of Wildlife vs. Endangered Species Scientific Authority,* 725 *F.* 2d 726 (D.C. Cir. 1984) a challenge was brought to standards used to control the export of bobcats. An injunction was issued in the district court for failure to take into account the bobcat population as an element of establishing the quota. After the injunction issued, the Endangered Species Act Amendments of 1982 were signed, specifically providing that there was no requirement to make population estimates. The district court found that this removed its basis for jurisdiction and vacated the injunction. Affirming that action, the circuit court said:

> We agree with the district court's dismissal of this action. Congress, through the amendments to the Endangered Species Act, has announced a new standard for the federal defendant to follow. Thus, plaintiff's challenge to the prior guidelines as violative of the old *Defenders I* standard is now moot. 725 *F.* 2d at 731

To the extent that First Fidelity is asserting any inconsistency between the federal and state law in banking, in such an instance when the state law in question has been amended so as to eliminate the inconsistency, the case is moot. *Monahan vs. Nebraska,* 687 *F.* 2d 1164 (8th Cir. 1982), cert. den. 103 *S. Ct.* 1252. Where the plaintiffs' stake in the liti-

gation has been removed by an intervening statute, there are simply no grounds for continuing. *Boston NAACP vs. Beecher,* 716 *F.* 2d 931 (1st Cir. 1983). Here, the plaintiffs' interest in having the merger exception to the 20% limitation repealed by implication has been eliminated by the fact that the legislature has now expressly repealed that exception and further changed the structure of the deposit cap so that it cannot now be maintained that the First Fidelity acquisition leaves it in violation of § 345(a).

Similarly, the second cause of action set forth in the complaint is also moot. The bank respondents' theory of a violation of the New Jersey Antitrust Act was that exceeding the 20% cap itself amounted to an action tending to create a monopoly position in New Jersey commercial banking. Because First Fidelity is now not in violation of the statewide cap, the bank respondents no longer assert that there is viability to the antitrust claim.

First Fidelity is certainly well aware of the change in New Jersey law, which was signed prior to the filing of the petition for certiorari. The bank respondents are at a loss to see any reason why First Fidelity is attempting to proceed with this case when it is apparent that no point is to be served by interpreting provisions which are no longer of any effect. There has never been any request for monetary damages and the basis for any injunctive relief initially sought obviously is no longer sustainable in the absence of the previous deposit limitation. Therefore, this Court should have no hesitation in finding the entire matter to be moot.

POINT TWO

NO FEDERAL CLAIM HAVING EVER BEEN ASSERTED BY THE PLAINTIFFS IN THIS CASE, AND THERE BEING NO FEDERAL REMEDY FOR THE PARTICULAR CAUSE OF ACTION ASSERTED, THE THIRD CIRCUIT CORRECTLY DECIDED THAT REMOVAL WAS IMPROVIDENT.

The law is well settled beyond dispute that the defense of preemption does not provide federal jurisdiction. The facts of this case provide no basis for application of the limited exception to that rule, so the remand order below was entirely appropriate.

As noted by this Court in its decision in *Franchise Tax Board,* there is a long line of Supreme Court decisions establishing that the existence of federal jurisdiction must be determined from the face of the complaint without regard to defenses. *Gully vs. First National Bank,* 299 *U.S.* 109, 57 *S. Ct.* 96, 81 *L. Ed.* 70 (1936); *Louisville and Nashville Railroad Co. vs. Mottley,* 211 *U. S.* 149, 29 *S. Ct.* 42, 53 *L. Ed.* 126 (1908); *Tennessee vs. Union and Planters' Bank,* 152 *U. S.* 454, 14 *S. Ct.* 654, 38 *L. Ed.* 511 (1894).

In the *Franchise Tax Board* decision the Court made it clear that where there is a claim of preemption of state law by a federal statute, federal jurisdiction is thereby provided if, and only if, the particular cause of action asserted under state law has been replaced by a concomitant federal claim under the preempting statute. For example, in *Franchise Tax Board,* the State as plaintiff was seeking to enforce a tax levy. That was not one of the particular causes of action created by the Employees Retirement Income Security Act (ERISA). Therefore, even though it was held that ERISA might preclude

enforcement of the tax levy, it did not give the State the right to seek the same relief. It was noted that a different result might pertain were the claim under state law one which could be maintained under ERISA. See 103 *S. Ct.* at 2854-2855. This was analogized to the situation in the *Avco* case where it was held that the force of § 301 of the Labor Management Relations Act was to not only displace state causes of action but to replace them with a federal one. See *Franchise Tax Board,* 103 *S. Ct.* at 2853-2854.

The only argument advanced by First Fidelity along these lines is that the bank respondents had a remedy in a challenge to the Comptroller's approval of the merger between FFBSJ and Gloucester County under the Bank Merger Act. However, First Fidelity's own exposition on the statutory scheme under the Bank Merger Act defeats its claim. There is no dispute that said statute provides a specific set of standards to be utilized, appearing at 12 *U.S.C.* § 1828(c)(5). Cases cited by First Fidelity, as to which the Third Circuit opinion in this case is allegedly inconsistent, do indeed hold that the appropriate federal administrative agent, be it the Comptroller, the Federal Reserve Board, or Federal Deposit Insurance Corp., is limited in its review of proposed mergers to those standards and may not go outside them. *County National Bank vs. Board of Governors,* 654 *F.* 2d 1253 (8th Cir. 1981); *Washington Mutual Savings Bank vs. FDIC,* 482 *F.* 2d 459 (9th Cir. 1973). The whole point is that the causes of action asserted here were totally distinct from any opposition to this merger under the Bank Merger Act or any other federal statute. Had the bank respondents chosen to file an action in federal district court challenging the Comptroller's approval of the

merger, then certainly that case would have to have been adjudicated based upon the Bank Merger Act standards which, as First Fidelity argues, are meant to be those of the Sherman and Clayton Acts apart from the one broadening to allow the consideration of anti-competitive effects being outweighed in the public interest as set forth in § 1828(c)(5)(B). No such lawsuit was filed. Rather, the bank respondents chose to pursue a purely state remedy based upon a limitation created by the New Jersey legislature, of no force or effect outside of New Jersey.

The issue then resolves itself as to whether or not New Jersey was precluded from having any limitation on deposits controlled by a single bank holding company. The Bank Merger Act does not address the question of bank holding companies, and is irrelevant to deciding this point.

The federal statue that should be looked at is the Bank Holding Company Act, 12 *U.S.C.* § 1841 et seq. It does provide for Federal Reserve review of acquisitions by bank holding companies or subsidiaries. Furthermore, it is true that the same standards applied under the Bank Merger Act are also part of the Bank Holding Company Act. 12 *U.S.C.* § 1842(c). However, that statute also provides in no uncertain terms that nothing therein prevents any state from exercising jurisdiction over bank holding companies and their subsidiaries. 12 *U.S.C.* § 1846. It has been held that this section leaves a state free to totally bar the formation of bank holding companies within its borders. *Commercial National Bank of Little Rock vs. Board of Governors,* 451 *F.* 2d 86 (8th Cir. 1971). This Court found no substantial federal question to review when the West Virginia Supreme Court upheld

a statue preventing a holding company from owning 25% or more of the shares of each or two or more banks, including national banking associations, and required the defendant to divest itself of such ownership interest as necessary to comply with the statute. *Security National Bank and Trust Co. vs. First West Virginia Bancorp Inc.*, 277 *S.E.* 2d 613 (W.Va. 1981), appeal dismissed, 454 *U.S.* 1131, 102 *S. Ct.* 986, 71 *L. Ed.* 2d 284.

First Fidelity asserts that because the standard to be utilized by federal agencies is also for use in any judicial proceedings challenging their determinations, the same standard filters down to state law such as the New Jersey deposit cap. Yet nothing in the numerous piecemeal quotes from the legislative history, appearing at pages 15 - 17 in the petition for certiorari, gives the slightest indication that Congress was addressing anything other than actions filed to challenge decisions of the Comptroller, the Federal Reserve Board or the Federal Deposit Insurance Corp. There is no sign that Congress even considered state laws governing holding companies.

It is readily apparent that by preserving the states' right to legislate regarding bank holding companies and their subsidiaries, Congress was leaving the way open for differing requirements in the various states. Therefore, it is simply not tenable to claim that the Bank Merger Act in anyway was intended to encompass consideration of a deposit cap which might be enacted in one state and not in another.[1]

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[1] Nine states currently have specific percentage limitations similar to that of New Jersey, while four other states require their respective banking authorities to review proposed bank

This Court has expressly held in the past with regard to § 1846:

> This section was intended to preserve existing state regulations of bank holding companies, even if they were more restrictive than federal law. *Lewis v. B. T. Investment Managers Inc.*, 447 *U.S.* 27, 48-49, 100 *S. Ct.* 2009, 2022, 64 *L. Ed.* 2d 702 (1980).

More recently, the legality of state legislation by which New England states opened their borders to bank holding companies from certain other states while barring those from others not part of a regional

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holding company acquisitions with an eye toward preventing possible monopoly positions. The states having percentage limitations are, in alphabetical order, Arkansas (Ark. Stat. § 67-2112, setting a limit of twelve percent of deposits): Indiana (Ind. Code § 28-2-13(19)(e) setting a 10% limit until July 1, 1986, an 11% limit until July 1, 1987 and 12% thereafter); Iowa (Iowa Code § 524.1802, setting an 8% deposit limit); Kentucky (Ky. Rev. Stat. § 287.900, setting a 15% deposit limit); Missouri (Mo. Rev. State. § 362.915, setting a 13% deposit limit); Nebraska (Reissued Rev. State. of Neb. § 8-903, setting a 9% deposit limit); New Hampshire (N.H.Rev. Stat. § 384-B:3 setting a 15% deposit limit); Oklahoma (6 Okla. Stat. § 502 setting an 11% deposit limit); Tennessee (Tenn. Code § 45-2-1405, setting a 16 1/2% deposit limit). Four other states, while not setting specific deposit limitations, do require their respective banking authorities to review all proposed bank holding company acquisitions with an eye toward preventing any possible monopoly position. These states are: Georgia [Ga. Code § 7-1-606(b)(1) forbiding approval if there would be a monopoly or a tendency to create one]; Nevada [Nev. Rev. Stat. § 666.125(3)(c) requiring review of the effect on competition in banking]; South Carolina (Code of Laws of S.C. § 34-24-50, an acquisition cannot be approved if it will establish a monopoly, effective July 1, 1986); West Virginia [W. Va. Code § 31A-8A-4(c)(1). placing limits on acquisitions if they are monopolistic].

compact was upheld in *Northeast Bancorp v. Board of Governors*, ___*U.S.* ___, 105 *S. Ct.* 2545 (1985). Due note was taken of the statement in the *B. T. Investment* case that banking is a matter of profound local concern. To the extent that this Court in *B. T. Investment* indicated that legislation could not be passed nullifying the federal statute, the reference was to interstate activities of bank holding companies as to which the commerce clause bars state legislation except to the extent permitted by the federal act. This case involves purely intra-state banking and so the limitation on state action addressed in *B. T. Investment* is inapplicable here.

The prime failing of First Fidelity is in refusing to recognize that there is a difference between review of the underlying merger between FFBSJ and Gloucester County and regulation of the statewide activities of the parent holding company. The antitrust standards relied upon by First Fidelity as being exclusive go only to the merger. Even in the context of the Federal Bank Holding Company Act it is clear that those same standards are to be utilized only in determining whether or not a particular acquisition should be approved. The focus of this case has been not the underlying merger but rather whether First Fidelity would be violating the statewide deposit cap, and in so doing also be in violation of the New Jersey Antitrust Act. The merger itself was important only in that it was the final step putting First Fidelity over the 20% limit.

It may well be that one remedial action sought in the prayer for relief in the complaint, namely setting aside of the merger between FFBSJ and Gloucester County, would have been inappropriate. The correct

injunction would be one similar to that approved by the West Virginia Supreme Court in the *Security National Bank* case, namely requiring divestiture sufficient to bring the defendant bank holding company into compliance with the state statutory limits on stock ownership. Thus, First Fidelity might have been ordered to divest itself of ownership interests sufficient to limit its holdings to less than 20% of New Jersey commercial banking deposits. That would not necessarily have to have been done in the context of the merger between FFBSJ and Gloucester County.

This same notion renders meaningless the entire dissertation in the petition for certiorari regarding the supremacy of federal law as to national banks (petition at pages 22-25). Much of the case law there cited is limited to a specific provision of federal law regarding the branch banking activities of national banks, which by its own terms provides that the federal law is determined by the content of state law. In particular, the Banking Act of 1933 provides that the Comptroller may approve the establishment and operation of a branch only when such establishment or operation is affirmatively authorized to state banks by state law. 12 *U.S.C.* § 36(c). Therefore, determination of the authority granted by state law on the face of the statute becomes a federal question in the context of a decision by the Comptroller pursuant to said § 36(c). See *Howell v. Citizens First National Bank of Ridgewood*, 385 *F.* 2d 528, 530 (3rd Cir. 1967). That is a far cry from the Bank Holding Company Act expressly providing that notwithstanding anything in the federal statute, state law is not preempted.

The jurisdiction of the Comptroller over the merger was, unquestionably, properly invoked. Nonetheless,

that does not mean it was exclusive. As the Third Circuit has had recent occasion to hold, the jurisdiction of more than a single reviewing entity may be called into play as to a particular transaction. Thus, in *Girard Bank v. Board of Governors,* 748 *F.* 2d 838 (3rd Cir. 1984) it was found that both the Comptroller and the Federal Reserve had to approve the transaction there at issue. Under the same principle, the Comptroller's jurisdiction did not require that the state law governing bank holding companies be disregarded.

As the Third Circuit correctly observed, the basis for the district court finding of federal jurisdiction in this case was the "artful pleading" doctrine as reflected by *Federated Department Stores Inc. v. Moitie,* 452 *U.S.* 395, 101 *S. Ct.* 2424, 69 *L. Ed.* 2d 103 (1980). Its analysis of the application of artful pleading to this case was apt in recognizing that unless it is applied "with circumscription" it may be an exception that swallows the rule. 783 *F.* 2d at 368. Moreover, the Third Circuit was just as correct in finding that notwithstanding the district court's disclaimer of reliance on federal preemption, "that was the practical effect of its holding." *Ibid.*

The decision below rested on well settled principles of law that have been upheld by this Court in numerous decisions throughout this entire century to the effect that federal preemption as a defense does not provide federal jurisdiction. Taking this together with the unequivocal congressional preservation of state law relating to bank holding companies, there is simply no basis for finding the Third Circuit to have erred.

CONCLUSION

For the foregoing reasons this matter should be declared moot, or alternatively the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

MARY LITTLE PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22 of the Rules of this Court, petitioners reply herein to the arguments of respondents that the case is moot due to a recent amendment of the New Jersey antitrust law and that, in any event, the Court of Appeals was correct in holding that an antitrust challenge to the merger of two national banks may properly be brought in state court under state antitrust statutes.

I.

A. Respondents assert that no "live" issue remains in this case since the market share of petitioners' merged national banks does not reach the figure proscribed by the recently amended New Jersey market "cap" statute. That it did not exceed the "old" state market "cap" did not, of course, preclude the institution or maintenance of the present suit. Respondent banks suggest, however, that "[a]t this point in time" (Br. in Opp. at 6) they do not intend to pursue any claim that the merger violates the state statute, and they claim that the case is therefore moot. As this Court has held, "[t]he burden of demonstrating mootness 'is a heavy one,' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co., Inc.*, 345 U.S. 629, 632-33 (1953). Respondents have failed to sustain this burden, and it is clear that the question involved—the applicability to national banks of state antitrust laws, such as market "cap" statutes—remains very much in controversy between the parties.

Section 17:9A-345(a) of the New Jersey statute, before and after amendment, related *only* to the acquisition of *bank stock*;[1] it did not, and does not, purport to reach acquisition by merger or by consolidation. Section 1842 *et seq.* of Title 12, U.S.C., refer to Bank Holding Company Act acquisitions and not to mergers or consolidations of commercial banks whether or not subsidiary to a holding company (unless so structured as to result in the acquisition of stock of a bank not previously controlled by the holding company).

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[1] The statutes cited in this Reply Brief are set out in the Appendix, *infra*.

The Third Circuit made two critical holdings: (1) The federal standards of the Bank Merger Act (and, inferentially, of the Bank Holding Company Act) are not exclusive but may be negated by the application of state law; (2) the merger of two national banks (the exclusive province of the U.S. Comptroller of the Currency since the enactment of section 215a(a) of Title 12, U.S.C., and New Jersey's parallel enactment of section 17:9A-148) can, if there is a holding company parent of the resulting bank, be subject to state antitrust law (itself limited to stock acquisitions by holding companies) and, beyond peradventure, may be tested under that state law in state court.[2]

This action cannot be considered moot since the opinion of the Third Circuit *presently* bars petitioner Bancorporation or any of its subsidiaries from mergers with any of ten or more large commercial banks, savings banks or savings and loan institutions in New Jersey (many of which affiliations would not violate federal antitrust standards) without being forced to litigate that merger through the state court system (with the State Attorney General in opposition all the way) before being able to seek federal court review, and then only by way of certiorari in this Court. As a practical matter, such a ponderous route would ef-

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[2] Compare this Court's ruling in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, 379 U.S. 411 (1965), that judicial economy would require that, where a statutory scheme (the Bank Merger Act here) provides for administrative review, judicial intervention should await the last required administrative action and then take the form of an appeal from that agency action. Here the last such administrative action is the approval of the Comptroller of the Currency. This action preceded and prescinded from that approval.

fectively preclude any such merger. Far from being mooted, the issues are critically in focus.

The issue before this Court is whether "in any judicial proceeding attacking a merger transaction," 12 U.S.C. § 1828(c)(7)(B), as a "violation of any antitrust laws" (other than § 2 of the Sherman Act), *id.*, "the standards applied by the court shall be identical with those that the [federal] banking agencies are directed to apply" (i.e., the competitive standards of the Sherman and Clayton Antitrust Acts), *id.* If so, then petitioners were entitled to remove the action to federal court, 28 U.S.C. § 1441(a), and the judgment of the Court of Appeals mandating a remand to the New Jersey state court system is patently erroneous. This issue is in no way "mooted" by a subsequent adjustment by the State Legislature to one of the two different state statutes invoked by the bank respondents as the basis of their claim to enjoin the merger. No matter what state law says, 12 U.S.C. § 1828(c)(7)(B) governs "in any judicial proceeding," and the ordered remand to state court necessarily should be reversed, so that the federal court's jurisdiction over the suit in the first instance is restored.

B. Even if this Court were to find that this case is now moot, the Court should not simply deny the petition without comment. Respondent banks have obtained a judgment from the Court of Appeals holding that anyone can challenge this or any other merger of insured banks in state court under substantive state standards that conflict with those of the Sherman and Clayton Acts. Such a judgment could prevent petitioners from contending in a related case still pending in state court and involving the same par-

ties,[3] as well as in subsequent actions by respondents challenging future New Jersey bank mergers, that the federal standards are exclusive. This Court has long recognized that decisions mooted during the appellate process can control subsequent litigation under the principles of res judicata and collateral estoppel, and that an appeal in such a case should not simply be denied or dismissed. The Court has rather adopted the practice of eliminating such prejudice in cases where mootness precludes a decision on the merits:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. [*United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).]

Accordingly, if the Court agrees with bank respondents that this case is now moot due to the intervening amendments of the New Jersey market "cap" statute, the appropriate procedure would be to grant the petition and simultaneously to reverse and vacate the judgment of the Court of Appeals.

II.

The brief for the Commissioner of Banking of the State of New Jersey significantly shifts the ground upon which she argued below. Below, the Commis-

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[3] In the Matter of the Application of the National Bank and Trust Company of Gloucester County, Docket No. A-4934-84T1, Superior Court of New Jersey, Appellate Division. *See* the Petition in the present case, at 8 n.3.

sioner had contended that the bank transaction at issue was a merger, that because state law did not purport to reach the merger of two national banks, the transaction did not fall within the ambit of state law and was, consequently, a proper subject for summary judgment should the District Court reach petitioners' motion for dismissal on the pleadings.[4]

In its brief in opposition to the petition for certiorari, the Commissioner has adopted, for the first time, and in contravention to her position explicated above, bank respondents' contention that, besides being a merger of two national banks, the transaction is also a holding company acquisition through which the parent of the remaining national bank is, somehow, acquiring the stock of the merged bank. This argument has always been fraudulent. As the Court of Appeals acknowledged, Bancorporation did not, at any time, ever acquire a share of NB&T stock. *See* 783 F.2d at 362. NB&T at no time ever was or became a subsidiary of Bancorporation, passing out of existence by force of the merger. Because Bancorporation never acquired any stock of a bank not theretofore controlled and never merged with the parent of such a bank, the *Girard* case[5] could not have relevance. (That case involved both a holding company merger and the acquisition by Mellon of the stock of another bank, both occasions for the application of the Bank Holding Company Act, 12 U.S.C. § 1842).

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[4] Letter of Irwin I. Kimmelman, Attorney General of New Jersey, to the Honorable Maryanne Trump Barry, United States District Judge, July 25, 1985 (submitted in lieu of brief with respect to bank respondents' motion to remand and petitioners' motion to dismiss).

[5] *Girard Bank v. Board of Governors*, 748 F.2d 838 (3rd Cir. 1984).

The need for the shift is plain. The state statute which allegedly has some relevance to this transaction, N.J. Stat. Ann § 17:9A-345(a), is part of the New Jersey Bank Holding Company Act and, by its terms, is limited to transactions involving acquisitions of *stock* in another bank: ". . . shall acquire ownership of more than 10% of the stock of another bank. . .". Thus, the repeated references to an acquisition of NB&T's stock by Bancorporation, which never took place, is a necessary, albeit fictitious, element in bank respondents' case, now adopted by the State.

In any case, the Commissioner's brief suggests too much. If the instant bank merger "may also be regarded as an acquisition of a bank by a bank holding company and [therefore] subject to New Jersey statutes regulating acquisition of banks by bank holding companies," Commissioner's Brief at 11, then the challenge to the "acquisition" had to have been brought "in the first instance," (*Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company, supra,* 379 U.S. at 421 (1965)), before the Federal Reserve Board, followed (if desired) by an action in the *federal* court system challenging the Board's approval of the "acquisition."[6]

As *Whitney* states, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." 379 U.S. at 420. Indeed, one year after the *Whitney* decision the Congress enacted both the 1966 amendment to the Bank Holding Company Act, 12 U.S.C.

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[6] In fact, the Board in the present case quite properly never asserted jurisdiction. Jurisdiction was asserted by the Board in *Girard.*

§ 1842(c), and the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), both of which provide, as *Whitney* contemplated, a uniform and comprehensive system of federal bank agency and Justice Department review of the competitive aspects of all insured bank mergers (under "any antitrust laws," 12 U.S.C. § 1828(c)(7)(B)) and acquisitions (12 U.S.C. § 1842(c)), designed to be the sole method of testing the transaction on that issue.

Thus, and critically, *Whitney* makes clear that any issue of a possible violation of state law (allegedly possible only with respect to an "acquisition" by a bank holding company and thus subject to the Bank Holding Company Act) was to be resolved by the Board (and hence the federal courts) "in the first instance." 379 U.S. at 421.

Finally, respondents' reliance upon *Commercial National Bank of Little Rock v. Board of Governors*, 451 F.2d 86 (8th Cir. 1971) (holding that states may bar the existence of bank holding companies within their borders), and *Security National Bank and Trust Co. v. First West Virginia Bancorp, Inc.*, 277 S.E.2d 613 (W.Va. 1981), *appeal dismissed*, 454 U.S. 1131 (1982) (holding that states may bar multi-bank bank holding companies within their borders) is misplaced.

In *Security*, the Supreme Court of Appeals of West Virginia held that a state law that prohibited a bank holding company from owning more than one bank did not violate the National Bank Act. This holding was not surprising, since Congress left the states free to make a policy choice of whether or not they would allow multi-bank holding companies to operate within their jurisdiction. As the Solicitor General stated in his Brief for the United States as Amicus Curiae:

> Congress enacted Section 7 [of the Bank Holding Company Act, 12 U.S.C. 1846] to enable the states "to exercise a veto" over bank holding companies that otherwise might be organized as a means of avoiding state anti-branch banking laws. *Grandview Bank & Trust Co. v. Board of Governors*, 550 F.2d 415, 419-420 (8th Cir.), cert. denied, 434 U.S. 821 (1977). See also H.R. Rep. No. 609, 84th Cong., 1st Sess. 3-4, 14-15 (1955); S.Rep. No. 1095 (Pt. 1), 84th Cong., 1st Sess. 10-11 (1955); 102 Cong. Rec. 6920 (1956) (remarks of Sen. Robertson). [Brief for the United States as Amicus Curiae, at 5, in First West Virginia Bancorp, Inc., et al., Appellants v. Security National Bank & Trust Co., et al., Supreme Court Docket No. 81-219, filed December 3, 1981.]

Thus, the Solicitor General concluded that *Security* did "not result in such a 'direct and positive' conflict with federal banking law as to warrant a finding of preemption under the Supremacy Clause." *Id.*, at 4.

The present case concerns the Bank Merger Act of 1966, which does mandate a uniform federal antitrust standard for all insured bank mergers. Moreover, the language of preemption in 12 U.S.C. § 1828(c)(7)(B) is plain, not implied.

Respectfully submitted,

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APPENDIX

APPENDIX
STATUTORY PROVISIONS CITED IN REPLY BRIEF

28 U.S.C. §1441(a):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The National Bank Act, 12 U.S.C. §215a(a):

One or more national banking associations or one or more State banks, with the approval of the Comptroller, * * * may merge into a national banking association located within the same State, under the charter of the receiving association. * * *

The Bank Merger Act of 1966, 12 U.S.C. §1828(c):

* * *

(2) No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank; * * *

* * *

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction,

the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. * * *

(5) The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

* * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical

with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, * * *

* * *

(8) For the purposes of this subsection, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia.

* * *

The Bank Holding Company Act as amended, 12 U.S.C. §1841 *et seq*:

§1842(a): It shall be unlawful except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. * * *

* * *

(c) The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or[1] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served. * * *

* * *

§1846: The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

N.J. Stat. Ann. §17:9A-148 (West 1984):

A. As used in subsection B of this section, "applicable Federal law" means the laws of the United States, as

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[1] "So in original. Probably should be 'of.' " 12 U.S.C. §1842, at 261 (1980).

presently enacted and as hereafter from time to time supplemented or amended, governing the merger or consolidation of a bank organized under State laws into a national banking association, under the charter of such association; * * *

B. One or more banks may, without the approval of the commissioner or any other officer, department, board or agency of this State, merge into or consolidate with a national banking association under the charter of such association, with the approval of the holders of at least 2/3 of the capital stock of each such bank entitled to vote. * * * [A] merger or consolidation authorized by this subsection shall be effected solely in the manner and with the effect provided by applicable Federal law, and no such merger or consolidation shall be subject to sections 132 through 147 or to any other law of this State; * * *

N.J. Stat. Ann. §17:9A-345, -347 (West 1984) (in effect prior to March 28, 1986):

§17:9A-345: Except as otherwise provided by sections 3 [§17:9A-346] and 4 [§17:9A-347] of this act, (a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next preceding such acquisition; * * *

§17:9A-347: Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 [§17:9A-345] of this act, if such acqui-

sition results from an exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

N.J. Stat. Ann. §17:9A-345 (as amended effective March 28, 1986):

Except as otherwise provided by section 3 [§17:9A-346] of this act, (a) No company or person which owns more than 25% of the stock of any bank located in this State or savings bank located in this State shall acquire ownership of more than 10% of the stock of another bank located in this State or savings bank located in this State or assume the deposit liabilities of another bank located in this State or savings bank located in this State in a manner which requires the approval of a federal regulatory authority pursuant to subsection (c) of section 18 of the "Federal Deposit Insurance Act," 64 Stat. 891 (12 U.S.C. 1828 (c)), or subsection (d) (11) and subsection (o)(2)(p) of section 5 of the "Home Owner's Loan Act of 1933," 48 Stat. 132 (12 U.S.C. 1464 (d)) if, at the time of that transaction, or if, as a result of that transaction, the company or person owns, or would own, more than 10% of the stock of one or more banks located in this State or savings banks located in this State, whose aggregate average deposits exceed 12% for the first year following enactment of this 1986 amendatory and supplementary act, 13% for the second year following enactment of this 1986 amendatory and supplementary act, and 13.5% for the third year and for the first one half of the fourth year following enactment of this 1986 amendatory and supplementary act of the aggregate average deposits of all depository institutions as of the two call dates for which published figures are available next preceding that transaction; * * *